UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., and WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS, INC., Plaintiffs, v. AT&T CORP., Defendant.	:	Civil Action No. 95-908 (WGB) **Filed Electronically**

BRIEF OF AT&T CORP. IN OPPOSITION TO THE MOTION OF WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. AND 800 DISCOUNTS, INC. TO VACATE THE STAY OF THIS MATTER

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AT&T Corp. ("AT&T") respectfully submits this brief in opposition to the motion of Plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. (collectively, "the Inga Companies") to vacate the stay in this matter.

PRELIMINARY STATEMENT

This Court previously stayed this matter pending final decision of the technical issues of tariff interpretation and federal communications policy that had been referred to the Federal Communications Commission ("FCC") (and to the court of appeals that reviews FCC determinations, the D.C. Circuit). Contrary to the Inga Companies' assertion, these proceedings have not been completed. Although the D.C. Circuit has rejected the primary claim of the Inga Companies and has strongly suggested that their remaining theories are meritless, the D.C. Circuit did not finally resolve these remaining issues, but remanded them to the FCC. In this regard, the Inga Companies are now expressly asking this Court to rule on a series of technical tariff claims that the Inga Companies previously raised before the FCC (and the D.C. Circuit) but that these tribunals have yet to definitively resolve. This is improper, and the motion to vacate the stay should be denied.

As explained more fully below, the threshold issue in this case is whether AT&T violated its tariffs when it refused to grant the earlier request of Combined Companies Inc. ("CCI") to transfer to Public Service Enterprises of Pennsylvania ("PSE") all the revenue generating "traffic" on certain long distance calling plans *without* also transferring the volume commitments that would give rise to "shortfall" or "termination" liabilities if the traffic volumes were not maintained. Judge Politan previously held that this issue is within the primary jurisdiction of the FCC, and the Third Circuit held that the FCC has primary jurisdiction over all related issues as well. Proceedings here were then stayed pending a final decision on these issues.

In its October 2003 decision, the FCC held that AT&T had violated its tariff in refusing the transfer. The FCC acknowledged that § 2.1.8 of the tariff prohibits transfers of service unless the new customer assumes "all obligations," but the FCC concluded that this provision did not "apply" to the proposed transfer of traffic only. Although the FCC assumed that the purpose of the transfer was to defraud AT&T out of shortfall/termination charges, the FCC also rejected AT&T's alternative arguments based on the tariff's antifraud provisions (while ignoring the tariff provision that authorized AT&T to deny additional services when fraud could result).

Earlier this year, the D.C. Circuit vacated the FCC's Order. It held that § 2.1.8 squarely applied to the proposed transfers and that they could not occur unless PSE assumed "all" of the associated obligations. While the D.C. Circuit stated that allowing the proposed transfers would "eviscerate[]" the purpose of § 2.1.8 (Opinion at 9-10) and expressly doubted the Inga Companies' claim that PSE had assumed all associated "obligations" (*id.* at 11 n.2), the court stated that "we do not decide precisely which obligations should have been transferred in this case," but left that issue open on remand before the FCC. Similarly, while the D.C. Circuit did not address the alternative antifraud claims, the FCC can now address the tariff provisions that it ignored in its earlier order.

Rather than reinstitute the proceedings at the FCC, the Inga Companies have now asked this Court to resolve the open issues and to rule on a series of technical issues of tariff interpretation. Under their view, the Court should now determine such matters as whether the phrase "all obligations" in § 2.1.8 somehow excludes minimum volume/term commitments; whether these commitments are part of the "minimum payment periods" within the meaning of § 2.1.8; whether the plans in question are "pre-1994" plans to which shortfall charges allegedly could not apply; and what the significance was of AT&T's withdrawal of a subsequent tariff

transmittal – and to resolve these tariff issues in a manner consistent with the nondiscrimination requirements of 47 U.S.C. § 202(a) and of the FCC's implementing regulations. *All* these issues were previously raised in the FCC and the D.C. Circuit proceedings, and all these issues can be efficiently decided by the FCC now -- under the D.C. Circuit decision.

In light of the D.C. Circuit's decision, it is understandable that the Inga Companies would want to try to shift forums mid-stream and to re-litigate these technical tariff and other issues in a court outside the D.C. Circuit. But this forum shopping is not only itself illicit; it is barred by the terms of this Court's stay, by the Third Circuit's earlier mandate, and by the doctrine of primary jurisdiction. The Court should thus deny the motion to lift the stay.

BACKGROUND FACTS

AT&T is a regulated common carrier and is a required by statute and by FCC regulations both to comply with its tariffs and to provide long distance service to all similarly situated customers at the same effective rates. *E.g.* 47 U.S.C. §§ 202(a), 203(c). One of the services that AT&T provides is inbound telecommunication service (*i.e.*, 800 service), which AT&T previously provided under Tariff No. 2, a tariff filed with the FCC. Under this tariff, AT&T provided volume discounts to customers who committed to certain traffic volume for a specified periods of time. These volume and term commitments were the essential *quid pro quo* for the discounted rates. So the tariff provided that if the customer failed to meet its revenue commitments, the customers was obligated to pay "shortfall" charges to make up the difference. Similarly, if the customer discontinued its service plans prematurely, Tariff No. 2 imposed an obligation to pay termination charges. Under the FCC's rules, tariffed services had to be made

available to resellers of long distance service under the *same* rates, terms, and conditions as apply to other customers under the terms of the tariff. [1]

The Inga Companies were engaged in the business of aggregating AT&T service for resale to their end-user customers. The Inga Companies subscribed to AT&T's Customer Specific Term Plan II ("CSTP-II"), one of the volume discount plans offered under Tariff No. 2. As AT&T's customer on nine CSTP-II plans, the Inga Companies were required to satisfy, among other things, the prescribed minimum revenue commitments on each of the CSTP-II plans.

This case arose when the Inga Companies proposed a two-step transfer that had the apparent purpose of permitting evasion of the minimum revenue commitments and associated shortfall and terminations liabilities, and as the FCC found, Alfonse Inga repeatedly told AT&T that this was the reason for the proposed scheme. (FCC Order, ¶ 10, attached to the Certification of Frank P. Arleo ("Arleo Cert.") as Ex. G). In particular, under the two-step transfer scheme, (1) the Inga Companies would transfer all of the plans (with all associated traffic) to CCI; and (2) CCI would, in turn, transfer all of the revenue producing numbers and virtually all of the traffic associated with those plans, but not the plans themselves or the plans' associated obligations, to PSE.

AT&T declined to process the two-step transfer. With respect to the second transfer, AT&T believed there was substantial risk that the "traffic only" transfer would have resulted in CCI (which was a new company) not being able to satisfy its obligations under the tariff, because

[1] The Inga Companies make various statements about the resale business and allege that AT&T resisted the FCC's "mandate" concerning resale. (Ptf. Brf. at 2-3). AT&T did not violate or resist any FCC "mandate." AT&T disputes much of Plaintiffs' general discussion as well as the discussion of their Supplemental Complaint, but will not burden the Court with a point-by-point response, as it is not necessary to decide the motion to vacate the stay.

CCI would no longer have the revenue stream (from the traffic) that would give it sufficient financial resources to satisfy its obligations. As AT&T later told this Court, it "refused to permit the transfer precisely because CCI, the 'new' customer in the transfer, did not assume 'all the obligations' of the old customer, CCI," in violation of § 2.1.8 of the tariff," and also because its tariff allowed it to deny transfers where fraudulent evasion of charges could otherwise result. (AT&T's March 30, 1995 Post-Hearing Memorandum, pp. 7-8 & n. 7, attached to the Affidavit of Richard H. Brown ("Brown Aff.") as Ex. A).

The Inga Companies, CCI, and PSE then filed this lawsuit, seeking to compel AT&T to execute the transfer requests. On May 19, 1995, this Court issued an Opinion and Preliminary Injunction finding that the transfer of the plans by the Inga Companies to CCI satisfied all tariff requirements and ordered AT&T to process the transfer.

With respect to the request to transfer only the traffic only from CCI to PSE, however, the Court found that the proposed transfer presented tariff construction issues that were within the primary jurisdiction of the FCC and directed that those issues be presented to the FCC for resolution. At one point, the Court phrased the issue as "whether Section 2.1.8 permits an aggregator to transfer traffic under the plan without transferring the plan itself in the same transaction." (May 19, 1995 Opinion at 15, Arleo Cert., Ex. C). The Court elsewhere noted that determining that issue would require a decision "whether a plan and its attendant obligations under a tariff may be separated from its traffic --- when that traffic might well constitute the only guarantee available that the plan's obligations would be honored." (*Id.*)

But in its Order, the Court broadly ordered that "the issue of the transfer of the aforesaid plans and/or their traffic as between [CCI] and [PSE] and its compliance or not with the terms of the governing tariff be referred to the [FCC] for adjudication under the doctrine of primary

jurisdiction." (*See* May 19, 1995 Preliminary Injunction, Arleo Cert. Ex. C). Thus, all questions relating to whether the denial of the transfers was authorized by AT&T's tariffs were referred.

Neither CCI nor the Inga Companies then filed any proceedings at the FCC for adjudication of these issues. In early 1996, CCI and the Inga Companies sought reconsideration of Judge Politan's May 19, 1995 decision, arguing that AT&T had not diligently pursued the referred questions before the FCC.[2] In a March 5, 1996 Opinion and Preliminary Injunction, Judge Politan did not reconsider the correctness of his earlier decision that the FCC had primary jurisdiction on the tariff interpretation issues. However, Judge Politan entered a preliminary injunction requiring AT&T to recognize the transfer of traffic from CCI to PSE pending the FCC's ruling on the referred matters, on the basis that AT&T had not pursued the issue at the FCC.

AT&T appealed Judge Politan's March 5, 1996 decision to the Third Circuit. On May 31, 1996, the Third Circuit reversed that decision and vacated the preliminary injunction. The Third Circuit noted that "AT&T objected to the transfer because the plaintiffs did not intend to transfer their potential liability for shortfall and termination charges, which form part of their contracts with AT&T" (May 31, 1996 Opinion at 1, Arleo Cert., Ex. E), and the Third Circuit held that the District Court "correctly referred th[is] question under the doctrine of primary jurisdiction." (*Id.* at 7). The Court went onto to hold that the FCC's primary jurisdiction extended to all issues involving the application of the tariff to the facts of this case, including the

[2] Initially, the Inga Companies did not file a petition at the FCC, but relied on the agency to adjudicate the tariff interpretation issues in the context of an AT&T filing to revise portions of Tariff No. 2. After AT&T withdrew its proposed revision, the Inga Companies moved to reconsider the May 1995 decision.

question of any preliminary relief, and that it was incumbent on the plaintiffs to institute appropriate proceedings at the FCC. (*Id.* at 7-8).

In July 1996, the Inga Companies filed a petition with the FCC seeking rulings on several issues, including a finding on whether:

> [a]t the time of the attempted transfer . . . in or about January 1995, by CCI to PSE, of the end user traffic under CSTP-II plans held by CCI, neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff . . . prohibited CCI from transferring the tariff without also transferring the CSTP-II plans with which the traffic was associated.

(See FCC Opinion at 6 Arleo Cert., Ex. G). That request describes the issue referred by the District Court on primary jurisdiction grounds.[3] In March 1997, the Court stayed this matter pending final disposition of any matters before the FCC. (March 12, 1997 Order, Brown Aff., Ex. B).

In the course of the proceedings before the FCC, the Inga Companies raised an array of issues. While their primary claim was that § 2.1.8 was inapplicable, they also contended that this section would not have authorized AT&T's conduct even if it did apply. First, § 2.1.8 requires assumption of "all obligations" of the former customer, "*includ[ing]*" (1) outstanding indebtedness and (2) "the unexpired portions of any minimum service period." But the Inga Companies asserted that only the latter obligations must be assumed and that the term and volume requirements at issue here were not matters that had to be assumed, relying on the

[3] After the May 1996 decision, there was a settlement between AT&T and CCI. Thereafter, the Inga Companies moved to "realign the parties" and sought to assert claims against CCI. Judge Hedges denied the motion, holding that the Inga Companies' claims against CCI would have to be in a separate action. (See March 10, 1998 Order, Arleo Cert., Ex. F). The Inga Companies then filed suit in this district, and AT&T was not a party to that action. Plaintiffs' statement here that "this Court" determined that their claims were not compromised by the AT&T/CCI settlement is misleading because the ruling (whatever it actually says) was in the Inga Companies/CCI case.

(irrelevant) ground that the minimum term for *other* WATS services under the tariff is one day. JA 187. (See Tariff No. 2, § 2.5.5, Brown Aff., Ex. C). Second, the Inga Companies asserted that, in any event, AT&T was in no danger of suffering unremunerated shortfall obligations because the plans at issue were somehow pre-June 1994 plans and were somehow exempt from shortfall liabilities. (See Reply Comments submitted by the Inga Companies in the FCC Proceeding at 7-11, Brown Aff., Ex. D). Third, the Inga Companies argued that the fact that § 3.3.1.Q of AT&T's tariff imposed a $50 per location transfer fee somehow supported its claims that traffic could be transferred without liabilities. (See Tariff No. 2, § 3.3.1.Q, Brown Aff., Ex. E). Fourth, the Inga Companies made arguments based on what they alleged to be thousands of comparable prior transfers. (See submission by the Inga Companies in the FCC Proceeding, Brown Aff., Ex. F). Finally, the Inga Companies relied on the ground that AT&T had filed and then withdrawn a tariff transmittal (No. 8179) that did no more than codify the existing requirements of AT&T's tariff. (See the Inga Companies' Joint Petition for Declaratory Ruling in the FCC proceeding at 19-20 and attached exhibit, Brown Aff., Ex. G). In addition to making each of the foregoing arguments before the FCC, the Inga Companies repeated them in a filing made with the D.C. Circuit. (See the Inga Companies' submission to the D.C. Circuit, Brown Aff., Ex. H).

In the FCC proceedings, AT&T refuted all these arguments. It demonstrated that § 2.1.8 applies and required PSE to assume the volume commitments associated with the transferred traffic and that, in all events, the antifraud provisions of AT&T's tariff authorized denial of the transfers.

In its October 17, 2003 Memorandum Opinion, the FCC stated that the District Court referred "the issue of the transfer of the aforesaid plans and/or their traffic as between [CCI] and

[PSE] and its compliance or not with the terms of the governing tariff." (FCC Opinion at 4). But the FCC held that the transfers violated the tariff.

First, the FCC held that Section 2.1.8 of Tariff No. 2 had no application to the "traffic-only" transfer from CCI to PSE and that the tariff allowed the plans to be transferred without PSE's assumption of any obligations at all, including potential shortfall and termination liabilities. (*Id.* ¶9). Relying on the (mistaken) predicate that Section 2.1.8 did not apply, the FCC also stated that CCI, not PSE, would be responsible for any shortfall obligations under the CSTP-II/RVPP plans. (*Id.* ¶11). Second, while assuming that the transfers would result in fraudulent evasion of shortfall charges (*id.*), the FCC held that AT&T's tariff did not permit it to remedy fraud by denying a transfer – which is a ruling that the FCC made by ignoring the tariff provision that expressly authorized AT&T to prevent fraud by denying the requested "new service" to PSE. *Compare id.* ¶ 12 & n. 65, *with* AT&T Tariff, § 2.8.2 (authorizing AT&T to deny "requests for additional service" when fraudulent evasion of charges can result). (A copy of that section of AT&T Tariff No. 2 is attached as Ex. I to the Brown Affidavit). The FCC also expressly declined to reach the other issues the Inga Companies had raised. (FCC Opinion, ¶¶ 14-17 & 20).

AT&T appealed the FCC's decision. On January 20, 2004, while AT&T's appeal was pending, the Inga Companies began a campaign to have this Court reactivate the case. In January 2004, they submitted an informal request to restore the matter from the inactive docket, but did not tell the Court that the matter had been stayed and that AT&T had filed an appeal from the October 2003 FCC decision. This Court denied Plaintiffs' informal application. Throughout 2004, Plaintiffs (or their principal, Mr. Inga) submitted papers to the Court seeking to reactivate the matter while the appeal was pending, and the Court denied each request because judicial

review of the October 2003 FCC was ongoing. (See, e.g., October 8, 2004 Letter Order from the Court, Brown Aff., Ex. J).

On January 14, 2005, the D.C. Circuit granted AT&T's petition for review. It held that a transfer of the traffic without the associated obligations was governed by Section 2.1.8 of Tariff No. 2, and that the FCC's decision that the tariff permitted the transfer rested on an interpretation of the tariff that was "implausible on its face." (D.C. Circuit Opinion at 10, Arleo Cert., Ex. H). The D.C. Circuit thus held that "any transfer of WATS required PSE to assume CCI's obligations" (*id.* at 7), stating that it would 'eviscerate' the acknowledged purpose of § 2.1.8 to allow PSE to acquire "nearly all services – all the benefits – associated with [the] CSTP plans" and to leave behind "CCI's obligations – the burdens under the plan." *Id.* at 9-10. At the same time, the Court stated that "we do not decide precisely which obligations should be transferred in this case, as the question was neither addressed by the Commission nor adequately presented to us." (*Id.* at 11). But in addition to noting the inconsistency of the Inga Companies' position with the tariff's purpose, the Court noted that the Inga Companies' assertion that the only obligations that have to be assumed are the outstanding indebtedness and the unexpired portions of any applicable minimum service period is at odds with the tariff's categorical "requirement that new customers assume *all* obligations of the former customer (emphasis supplied [by the D.C. Circuit])." (*Id.* at 11 n.2).

Similarly, the D.C. Circuit did not reach the FCC's grounds for rejecting AT&T's alternative claims based on the antifraud provisions of the tariff. The FCC had not defended this aspect of its decision on the merits, but had claimed only that it had not had an opportunity to consider the language of the tariff that authorized AT&T to prevent the fraud by refusing to provide PSE the new service that it was requesting through the transfer. In the unlikely event

that the FCC does not hold that AT&T's conduct was authorized by § 2.1.8 of the tariff, it can address the alternative claims based on the tariff's antifraud provisions on remand.

The Inga Companies did not respond to the D.C. Circuit's January 2005 Opinion by asking the FCC to revisit the question of tariff interpretation in light of the Court of Appeal's rejection of the FCC's initial interpretation. The Inga Companies did not act even though they solicited the advice of the FCC's Acting General Counsel, who told the Inga Companies that they have the option to pursue further proceedings with the FCC to address any issues that were left open by the D.C. Circuit's Opinion. (Brown Aff., Ex. K). Instead, Plaintiffs filed in this Court a series of Certifications from Mr. Inga and later this motion in this Court in an attempt to have this Court, not the FCC, decide the tariff interpretation issues that this Court and the Third Circuit have held to be matters for the FCC (and the D.C. Circuit).

LEGAL ARGUMENT

This Court Should Not Vacate The Stay.

In seeking to vacate the stay, the Inga Companies' primary claim is that the only question that was referred to the FCC was the "narrow issue" whether § 2.1.8 of AT&T's tariff allows "traffic" to be transferred. The Inga Companies assert that because the D.C. Circuit answered that issue, the purpose of the primary jurisdiction referral has been met.

This is nonsense. It had never been disputed in this case that transfers of traffic are permissible under § 2.1.8 *when* the associated liabilities are assumed. As this Court, the Third Circuit, and the FCC have all made explicit, the question that has been held to be within the primary jurisdiction of the FCC was not just the narrow question that the Inga Companies have now contrived. Rather, it is whether AT&T "complied" with its tariffs by refusing to transfer all the traffic on the relevant plans unless and until PSE assumed the associated volume and term commitments that would give rise to shortfall or termination liabilities if the commitments were

not met. This Court, the Third Circuit, and the FCC all expressly stated that this is the issue that had been referred. *See supra.*

And this issue has not yet been definitively decided. While the D.C. Circuit has strongly indicated that § 2.1.8 authorized AT&T's actions, the D.C. Circuit did not rule on the question of precisely what "obligations" PSE was here required to assume, and these issues remain open. Under the primary jurisdiction referral, if the Inga Companies wish to continue to pursue their claims, it is their obligation to file an appropriate motion or other pleading before the FCC and to raise the issues there.

In this regard, the Inga Companies' motion is vivid proof that it is asking the Court now to decide issues that were previously referred to the FCC by this Court and the Third Circuit alike. For the arguments that it is now asking the Court to resolve are, without exception, technical claims of tariff interpretation and communications policy that the Inga Companies previously submitted to the FCC. In particular, before it made these precise claims in its motion to lift the stay, the Inga Companies had argued both before the FCC and the DC Circuit that: (1) the obligations that must be assumed under § 2.1.8 are not "all obligations of the former customer" but only the "outstanding indebtedness" and "unexpired portion of any applicable minimum payment period," (2) that the term and volume commitments that can give rise to shortfall/termination liabilities are not unexpired portions of minimum payment periods, (3) that despite the tariff language and statutory and other requirements, shortfall and terminations somehow do not apply to the plans at issue, (4) that AT&T's withdrawal of Tariff Transmittal 8179 somehow supports the Inga Companies' claims, (5) that § 3.3.1.Q of AT&T's tariff and its $50 per location fee for transfers somehow establishes that customers can transfer all the traffic under plans without associated volume commitments, and (6) that other transfers that occurred in

the past also support the Inga Companies' positions. Obviously, the Inga Companies made these claims to the FCC because they knew full well that these issues were encompassed within this Court's and the Third Circuit's primary jurisdiction referrals, and these epitomize the technical issues of tariff interpretation and communications policy that fall within the FCC's primary jurisdiction. That confirms that the issues cannot be adjudicated in this Court under its prior order and the Third Circuit's mandate.

Ironically, the Inga Companies also support their claims by relying on statements from the FCC Opinion that the D.C. Circuit has found to be legally flawed and that the D.C. Circuit vacated. Plainly, the FCC decision in Inga's favor that has been reversed affords no possible basis for vacating the stay. In making the primary jurisdiction referral, this Court and the Third Circuit knew full well that decisions of the FCC are all reviewable in the D.C. Circuit, which is a court with substantial experience and expertise in telecommunications matters. That is why this Court refused to lift the stay while the October 2003 FCC decision was on appeal to the D.C. Circuit and before the D.C. Circuit acted. Because the FCC decision has now been vacated by the D.C. Circuit, the FCC decision is a legal nullity.

Against this background, we will briefly correct some of the other glaring errors in the Inga Companies' motion.

A. There Has Not Been A Final Determination On The Issues Referred On Primary Jurisdiction Grounds.

First, to support their contention that there is final resolution of the referred issues, the Inga Companies misconstrue the D.C. Circuit's decision. That decision does not, as Plaintiffs suggest, stand for the proposition that "[Section 2.1.8 of AT&T FCC Tariff No. 2] allows traffic transfers without the plan..." (Ptf. Brf. at 9). Rather, the D.C. Circuit held that a requested transfer of traffic without the plans themselves is governed by § 2.1.8 of Tariff No. 2 and cannot

occur unless the new customer assumes "all obligations" of the former customer. While indicating that the Inga Companies' claims are likely meritless, the DC Circuit did not decide this issue. (D.C. Circuit Opinion at 10-11). It stated that § 2.1.8 would **not** allow a transfer of service without "all" the attending obligations but that it was not "decid[ing] precisely which obligations should have been transferred in this case." (*Id.* at 11 & n. 2). Thus, the issue referred to the FCC by this Court remains unresolved, and the Inga Companies' statement that "[t]he D.C. Circuit has conclusively decided [the] issue [referred to the FCC] in [their] favor" is plainly incorrect.

B. The Obligations That PSE Was Required To Assume On The Transfer Is An Important Issue That Has Not Been Finally Resolved.

The Inga Companies next argue that the "entire obligations issue" is a "red herring," and they base this assertion on language in the now-vacated FCC's decision that PSE was not required to assume obligations for shortfall charges. (See Ptf. Brf. at 9-10). However, because "[t]he Commission's order in this case is entirely predicated on its [erroneous] determination that Section 2.1.8 of Tariff No. 2 does not apply to the movement of traffic" (D.C. Circuit Opinion at 6), that FCC "determination" must be revisited. It is patently obvious that the FCC's one-sentence discussion of the obligations assumed by PSE were based on the false premise that the CCI-PSE transfer was not governed by the tariff provision (§ 2.1.8) that requires the new customer to assume all obligations of the former customer. Based on the D.C. Circuit holding that § 2.1.8 governed the proposed transfer, the FCC's statement has been vacated. As a result, the Inga Companies are simply wrong in saying that "the question of which obligations are assumed on traffic transfers without the plan has been answered by the FCC," for that "determination" does not survive the D.C. Circuit's decision.

Plaintiffs' other attempts to downplay the significance of shortfall charges miss the mark. Their claim that Judge Politan had found that shortfall and termination obligations are "illusory" (Ptf. Brf at 12 n.4), mischaracterizes this Court's previous statements.[4] As both this Court and the D.C. Circuit recognized, whether the CCI-PSE transfer request complied with AT&T's tariff depended on whether PSE had agreed in writing to assume all obligations. The claim that shortfall charges are not a genuine obligation ignores the tariff's language, statutory and regulatory requirements, and court decisions, including one by Judge Politan in 2000, awarding AT&T shortfall charges incurred under its tariffs. *See Telecom Int'l America, Ltd. v. AT&T Corp.*, 67 F. Supp.2d 189, 221 (S.D.N.Y. 1999) (granting summary judgment for shortfall charges); *800 Services, Inc. v. AT&T Corp.*, Civil Action No. 98-1539, (D.N.J. Aug. 28, 2000) (awarding approximately $1.3 million in shortfall charges) (Politan, J.), *aff'd*, 2002 WL 215625 (3d Cir. Feb. 12, 2002).

The reality is that the volume discounts extended to the Inga Companies and other customers are lawful under 47 U.S.C. § 202(a) of the Communications Act only because the customer has made volume and term commitments that are enforced through shortfall (or other charges) if the volumes are not reached during the applicable term periods. These are not a "windfall" to AT&T, but an essential *quid pro quo* for the volume discounts that enable the Inga Companies to amass the traffic on their plans (that they sought to transfer to PSE). They are, in

[4] There is also no merit to Plaintiffs' claim that the nine plans were "immune" from shortfall or termination charges because they were supposedly ordered before June 17, 1994. Judge Politan made no such finding; at most, the Court noted that in the context of termination charges, there were methods for defraying or erasing liability by transferring commitments to a new plan. (May 19, 1995 Opinion at 11). That observation clearly does not constitute a finding that Plaintiffs' plans were immune from shortfall or termination. Moreover, as the FCC noted, whether these plans were pre- or post-June 17, 1994 plans is disputed. (*See* FCC Opinion at ¶19 n. 93).

the D.C. Circuit's words, a "burden" that had to be transferred to PSE along with the traffic that was the "benefit" of the service. (D.C. Circuit Opinion at 9-10). Because the proposed transfers were of *all* the revenue-generating telephone numbers on the Inga Companies 9 CSTP plans, it would create, in the D.C. Circuit's words, an "obvious end run" around the tariff if the traffic here could have been transferred without the volume commitments that allowed the traffic to exist in the first place. (*Id.*)

Likewise, the Inga Companies' contention (Ptf. Brf. at 14) that the shortfall issue has been "mooted" because AT&T supposedly was compensated for these charges when it settled with CCI is wrong. That CCI has now resolved its obligation to pay shortfall charges in some fashion says nothing about whether the requested CCI-PSE transfer complied with AT&T's tariff at the time CCI and PSE made the request – *before* these obligations had been satisfied. In sum, there is no merit to Plaintiffs' current claim that the "entire obligations" issue has now become irrelevant.

Thus, because the FCC's earlier decision has been vacated and is now a legal nullity, the Third Circuit's mandate and this Court's prior decision each mean that the Inga Companies must return to the FCC if they wish to continue to pursue their claims against AT&T. And the Inga Companies may clearly do so. Although they previously claimed that the FCC indicated that proceedings at the agency were "over," the Acting General Counsel of the FCC told Mr. Inga in an April 27, 2005 letter that Plaintiffs have the option to pursue further proceedings with the FCC to address any issues that were left open by the D.C. Circuit's opinion. Accordingly, the Court should deny Plaintiffs' motion to vacate the stay.

C. The Court Should Decline To Consider The Inga Companies' Tariff Interpretation Arguments.

The Inga Companies also make arguments that are designed to convince this Court to accept their interpretation of Section 2.1.8 of Tariff No. 2, but these arguments vividly confirm that there has been no agency determination of the referred issues. Plaintiffs contend that Section 2.1.8 required PSE to assume only two obligations in order for the CCI-PSE transfer to comply with AT&T's tariff (1) outstanding debt for the service; and (2) the unexpired portion of any applicable minimum payment period(s). (Ptf. Brf. at 10). The basis for this assertion is that the tariff says that the obligations that must be assumed "*include*" these two obligations, which obviously does not establish that these are the only obligations that must ever be assumed. As the D.C. Circuit suggested (Opinion at 11 & n.2), the Inga Companies' "enumeration" of these two requirements is inconsistent with the tariff's overriding "requirement that the new customer assume '*all* obligations of the former Customer (emphasis added) [by the D.C. Circuit]." In any case, this is the issue that the D.C. Circuit expressly declined to resolve, but left open for the FCC to decide on remand.

Further, while formally leaving the issue open, the D.C. Circuit set forth all the considerations that support AT&T's claim that the tariff precluded a transfer unless PSE assumed "all obligations," *particularly* including the volume/term commitments that can give rise to shortfall and termination liabilities if the traffic volumes are not maintained. The D.C. Circuit stated that it is the "unquestioned rule" that the new customer must notify AT&T in writing that it agrees to assume all obligations before any transfer can occur under § 2.1.8. (*Id.* at 9) The D.C. Circuit also stated that the purpose of § 2.1.8 was to maintain intact the balance of obligations and benefits when one customer stepped into another's shoes (*id.* at 10), and that by attempting to transfer all the traffic under a plan *without* the volume commitments that

allowed the traffic to be exist, the plaintiffs were attempting an "obvious end-run around" the plain terms and purposes of the tariff:

> The reason AT&T seemed to equate the transfers in this case with a transfer of plans is that CCI sought to move *virtually all* of the billed telephone numbers in each of its CSTP II plans. Thus, for each of the nine plans, CCI asked AT&T to move all but one, or all but two, of the telephone numbers included in that plan. In doing so, CCI asked AT&T to move nearly all of the services – all the benefits – associated with its CSTP II plans. What was left behind were CCI's obligations – the burdens under the plan. Accordingly, even if small scale transfers of traffic were outside the scope of Section 2.1.8, allowing *this* transaction to go through would create an obvious end-run around the unquestioned rule that new Customers had to 'assume all obligations' in transferring WATS *plans*. Any reseller could circumvent Section 2.1.8 simply by asking AT&T to move its business one billed telephone number at a time. Using such a scheme, a reseller could move every component of a plan, save its obligations to AT&T. . . .

(*Id.* at 9) (emphasis in original).

The Inga Companies (Ptf Brf. at 12) advance a number of arguments against AT&T's tariff interpretation and the one suggested by the D.C. Circuit. All these arguments ignore that, as the D.C. Circuit noted, the proposed transfer did not apply to a few individual phone number "accounts," but encompassed all the revenue-producing phone numbers on the plans and was the economic equivalent of the transfer of all of the benefits of the entire plan. But the Inga Companies should present those arguments to the FCC, not to this Court. Similarly, the Inga Companies' attempt to draw a distinction between "plan obligations" and "account obligations," which finds no support in the tariff language, can also be presented to the FCC. That agency can also consider Plaintiffs' arguments that a variety of other factors somehow establish that shortfall and termination obligations were not among the "all obligations" that a new customer had to assume for a transfer in January 1995: the language of § 3.3.1.Q of the tariff; the withdrawal of the Transmittal 8179; the prior transfers that occurred; and the (baseless) allegation that these were pre-June 1994 plans that are exempt from shortfall liabilities.

The decisive factor here is that the Third Circuit has affirmed this Court's finding that the FCC has primary jurisdiction over the referred issues, and the Third Circuit has held that the FCC's primary jurisdiction extends to all matters involving determinations of whether AT&T complied with the tariff in denying the transfer. The FCC is equipped now to consider all of the arguments raised by Plaintiffs in light of the D.C. Circuit's decision. Although Plaintiffs complain about the length of time this matter was pending at the FCC before it issued its October 2003 decision, the delays occurred because the Inga Companies failed to convey to the FCC that the CCI-AT&T settlement did not moot all issues in this case. (*See* D.C. Circuit Opinion at 5). The Inga Companies do not contend (and cannot contend) that AT&T's conduct caused or contributed to any of these delays. Finally, it was the Inga Companies who *chose* not to return to the FCC after the D.C. Circuit decision, for they elected to try to convince the Court that the Third Circuit's mandate had been fulfilled. As demonstrated above, because the primary jurisdiction issues remain unresolved by the agency, the stay should remain in effect pending a final determination of the referred issues.

CONCLUSION

For the foregoing reasons, the Court should deny the motion of the Inga Companies to vacate the stay in this matter.

Respectfully submitted,

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Dated: June 13, 2005

CERTIFICATION OF FILING

I hereby certify that on this date that the within Brief of Defendant AT&T Corp. in Opposition to the Motion of Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. to Vacate the Stay of This Matter and Affidavit of Richard H. Brown were electronically filed with the United States District Court for the District of New Jersey, Clarkson S. Fisher Federal Building and U.S. Courthouse, 402 East State Street, Trenton, New Jersey 08608.

RICHARD H. BROWN

DATED: June 13, 2005

CERTIFICATE OF SERVICE

I hereby certify that Frank P. Arleo is listed as an electronic filer with the District of New Jersey.

RHB

RICHARD H. BROWN

Dated: June 13, 2005

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June 27, 2005

Honorable William G. Bassler, U.S.D.J.
United States District Court
M.L. King, Jr. Fed. Bldg. & Courthouse
Room 5060
50 Walnut Street
Newark, New Jersey 07102

Re: Combined Companies, Inc., et al. v. AT&T
Civil Action No. 95-908

Dear Judge Bassler:

INTRODUCTION

As Your Honor is aware, this law firm represents plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. in this matter. Plaintiffs' motion to lift the stay imposed by this Court 10 years ago will be heard on a date and time to be set by the Court. In their moving papers, plaintiffs established that the stay must be lifted because (1) the D.C. Circuit has conclusively answered the sole question referred by the Third Circuit several years ago; and (2) all other questions of interpretation concerning the subject tariff have been resolved by the FCC and it is senseless to request it to make the same determinations again.

In opposing plaintiffs' motion, AT&T, has filed a submission that is both factually and legally incorrect. AT&T has submitted 100 pages of exhibits in an attempt to muddy the waters and further delay this matter. However, the time for delay is over. The rulings of the Third Circuit, FCC and D.C. Circuit make clear that plaintiffs' attempted transfer of traffic only under AT&T's tariff

was proper and AT&T's failure to make the transfer is a violation of § 203(c) of the Communications Act. No further rulings are needed by the FCC.

AT&T'S PRELIMINARY STATEMENT AND BACKGROUND FACTS

1. AT&T's Preliminary Statement

AT&T makes numerous factual assertions that are unsupported by any evidence, belied by AT&T's prior conduct and are simply incorrect. Happily, each misstatement is easily refuted. AT&T's assertions will be addressed seriatim.

Beginning with AT&T's Preliminary Statement, AT&T makes the bold statement that the D.C. Circuit Court has rejected the primary claim of the Inga Companies and has strongly suggested that the remaining theories are "meritless." Def. Brf. ("DB") at p. 1. The assertion is false. Plaintiffs' primary claim always has been that its attempted traffic transfer was properly done in accordance with § 2.1.8. Plaintiffs have demonstrated that they even used AT&T's required TSA forms in making the transfer request.[1] By ruling that the traffic transfers were permissible under § 2.1.8, the D.C. Circuit has wholly endorsed plaintiffs' position. Thus, plaintiffs went from an FCC decision holding that its transaction was not prohibited to a D.C. decision that the transaction was expressly permissible.

Also, contrary to AT&T's assertion, there is no suggestion anywhere in the D.C. Circuit's opinion that plaintiffs' remaining theories are "meritless." Id. at 1. In fact, the D.C. Circuit indicated that it was only ruling on the narrow question as to whether § 2.1.8 permitted the transfer.

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[1] Before the D.C. Circuit, AT&T conceded as much. AT&T's brief stated CCI's use of "Transfer of Services Agreement" forms to request the pertinent movement of traffic conclusively established that Section 2.1.8 applied to their request. Arleo Supp. Cert at Ex. A. At oral argument, AT&T's counsel stated: "No, but the transfer form happens here to **say exactly what the tariff says**, and the only way you can **satisfy the tariff** is either use our form or submit in writing something that says exactly what our form says. Id. at Ex. B.

Next, AT&T argues that the D.C. Circuit remanded remaining issues to the FCC. DB at p. 1. That is entirely false. The FCC has advised that there is no remand and no issues presently pending before the FCC. Id. at Ex. C.

Next, AT&T asserts that "the FCC acknowledged that § 2.1.8 of the tariff prohibits transfers of service unless the customer assumes 'all obligations'". DB at 2. The FCC's ruling explicitly stated that "all obligations" did not include S&T; but only what was encompassed within § 2.1.8 in January of 1995. The D.C. Circuit ruled that the FCC's conclusion that § 2.1.8 did not apply to traffic only transfers was incorrect. However, the ruling does not change the FCC's interpretation of that section when it applies. The FCC interpreted § 2.1.8 to mean that the only two obligations contained in the tariff (before AT&T attempted to amend it 11 months later) must be assumed by the transferee. It is obvious the FCC used Section 2.1.8 to determine which obligations were to be assumed, because it agreed with the District Court and determined CCI, and plaintiffs' companies were, as 2.1.8's language states, jointly and severally liable. Under the FCC's predicate the plaintiffs' transaction had to meet an even more stringent "obligations assumed" test because the FCC believed 2.1.8 only allowed whole plan transfers and plaintiffs were only moving location traffic. So if anything, this forced PSE to assume, by the FCC's predicate, even more than it had to; as if PSE was assuming a whole plan and not just accounts. Therefore, the FCC error had no negative affect on AT&T, and if anything the erroneous predicate over compensated AT&T. AT&T now asserts that two additional obligations, shortfall and termination ("S&T"), also had to be assumed by the transferee even though the tariff does not so state. As we conclusively demonstrated in our moving brief, S&T obligations were not a part of the filed tariff at the time of the requested transfer, they were added prospectively

11 months after the transaction at issue.[2] See Orloff v. FCC, 352 F.3d 415, 421 (stating that "filed tariffs are pointless if the carrier can depart from them at will.")

Moreover, even assuming that the tariff somehow is ambiguous on this issue (although a plain reading strongly suggests it is not), it must be construed against the drafter, AT&T. See Commodity News Services, Inc. v. Western Union, 29 FCC 1208, aff'd, 29 FCC 1205 (1960).

AT&T again plays fast and loose with the facts when it states that the FCC "assumed that the purpose of the transfer was to defraud AT&T out of shortfall/termination charges." DB at p. 2. The FCC made no such assumption. In reality, it stated in its opinion: "even assuming that AT&T reasonably suspected 'fraudulent use' under Section 2.2.4 the remedy under its tariff . . . was a temporary suspension of service, not a permanent refusal to move the traffic. Arleo Cert. at Ex. G, p. 12. In short, the FCC has ruled that AT&T's only remedy was to temporarily suspend service – which it did not do. The illegal remedy was a clear violation of the Communications Act. Thus, as the FCC found, AT&T, by using an illegal remedy, is precluded from relying upon the argument that it is entitled to S&T obligations.[3]

AT&T then goes on to suggest that there are "open issues" which were originally raised by plaintiffs and not adequately addressed by the FCC. DB at p. 2. The argument is a red herring. The Third Circuit referred only one question: Whether § 2.1.8 permitted transfers of traffic without a

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[2] Further support is found in the tariff amended on November 9, 1995. It states "the shortfall charge will not apply in connection with the discontinuance of a CSTPII that was ordered prior to June 17th, 1994. Thus, it is clear that plaintiffs' plans were grandfathered and were immune from penalties. AT&T senior counsel Charles Fash admitted as much in a July 3, 1996 letter wherein he stated that shortfall charges could not have been in issue at the time of the traffic transfer. Id. at Ex. D.

[3] AT&T also asserts that the FCC failed to consider §2.8.2, which may be used to deny additional service in the case of suspected fraud. First, AT&T never raised this argument to the FCC and, therefore, was barred from raising it on appeal. Second, as the FCC argued to the D.C. Circuit, it is common sense that moving traffic away from CCI cannot be considered a denial of "additional service" to CCI. Similarly, PSE cannot be subject to the sanction of denial of service under its tariff for any alleged non-payment of charges by CCI .

transfer of the entire plan. AT&T has submitted voluminous exhibits in an attempt to create the misimpression that there are open issues when there are not. Further, any ancillary issues are moot since it is undeniable that AT&T used an illegal remedy and, thus, cannot rely on its alleged S&T charges even if the plans somehow were not immune from the charges.

Finally, the fact that plaintiff may have submitted additional issues to the FCC for interpretation does not mean that they are duty bound to do so once again now that the D.C. Circuit has ruled. Stated differently, the only question referred by the Third Circuit has been answered. The fact that the D.C. Circuit ruled that the FCC incorrectly concluded that § 2.1.8 did not allow traffic only charges does not change the fact that the FCC has fully interpreted that tariff. In other words, as a result of the D.C. Circuit's opinion, the FCC's prior interpretation now applies not only to plan transfers but also traffic transfers. There is no reason to seek additional interpretation.

2. AT&T's Background Facts

AT&T's recitation of the background facts are similarly distorted. First, AT&T asserts that the "volume and term commitments were the essential quid pro quo for the discounted rates." DB at p. 3. That is simply not so. Plaintiff's companies were by far the largest aggregators with $54 million in billing. Yet, they received only a 28% discount. In stark contrast, PSE's CT516 plan was given a whopping 66% discount on only $4 million per year in billing.[4] Therefore, AT&T's rhetoric that the S&T obligations were the essential quid pro quo for the discounted rates is pure fantasy.[5]

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[4] In fact, plaintiffs' own office was offered 51.3% discount on its $200.00 per month phone bill, as were other mom and pop businesses. Supp. Cert at Ex. E.

[5] Also, AT&T denies it had engaged in a campaign to put aggregators out of business. The facts show otherwise. Id. at Ex. F.

Next, in an effort to further support its unjustified refusal to make the transfer, AT&T asserts that Mr. Inga admitted to an AT&T manager that the purpose of the traffic transfer was the evasion of S&T liability. DB at p. 4. This statement is not only false, it defies logic. First, it is absurd to believe that Mr. Inga would notify AT&T that he was attempting to evade the S&T policies, especially when AT&T controlled all of the money.[6]

Also, on page 4 of its brief, AT&T claims that it declined to process the two-step transfer because it believed "there is a substantial risk that the 'traffic only" traffic would have resulted in CCI (which is a new company) not being able to satisfy obligations under the tariff." DB at 4. AT&T ignores the simple fact that under § 2.1.8, both companies would remain jointly and severally liable for AT&T's alleged shortfall. Correctly recognizing this, the FCC stated:

> If AT&T had moved the traffic from CCI to PSE, then all of the traffic that CCI had used to meet its CSPTII/RVPP commitments would be associated with PSE's CT516. Further, CCI (as well as the Inga Companies), but not PSE, would continue as being responsible for any shortfall obligations under the CSTPII/RVPP plans. Once all of its traffic is moved to PSE, CCI might have needed to amass new traffic in order to meet its commitments under its CSTPII plan. AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.

Id. (emphasis supplied). The D.C. Circuit Court's ruling that § 2.1.8 was applicable to this transaction does not change the FCC's common sense interpretation and there is no reason to return to the FCC for reaffirmation.

Incredibly, AT&T's then asserts that plaintiffs' primary claim to the FCC was "that 2.1.8 was inapplicable." DB at p. 7. AT&T's statement evidences a complete misunderstanding (or an

[6] This claim is particularly suspect in light of the fact that Mr. Inga has provided taped conversations with 13 AT&T senior managers – including the affiant – wherein all stated that plaintiffs' plans were forever immune from S&T obligations. The tapes have been provided to AT&T and this Court.

intentional misstatement) of plaintiffs' position. In any event, plaintiffs have already addressed this issue infra.

Unable to explain why it added S&T obligations prospectively 11 months after the transaction, AT&T needed to come up with a new defense. In doing so, however, AT&T misquotes the second obligation in order to set up its argument. The tariff actually states "These obligations include (1) all outstanding indebtedness for WATS and (2) the unexpired portion of any applicable minimum payment(s) periods. AT&T misstates obligation No. 2 as "the unexpired portions of any minimum service. DB at p. 7. Obviously, payment is not service. AT&T makes this misstatement so that it can argue that S&T obligations are actually minimum payment (service to AT&T) periods. However, the tariff does not say that and to the extent it is ambiguous it must be construed against AT&T. DB at p. 7. Further, plaintiffs also utilized § 2.5.7 which waives S&T due to circumstances beyond the customer's control.

In reality, the record and the nine signed TSA's make clear that plaintiffs intended that PSE assume all the obligations required by § 2.1.8 as it then existed. AT&T never reached this issue because it balked at making the transfer based on its unsupported speculation that plaintiffs were trying to avoid their obligations.

Having laid a false foundation, AT&T then asserts that obligation (b) of § 2.1.8 includes S&T obligations. However, if this is true, why did AT&T then add these obligations to § 2.1.8 on a prospective basis 11 months after the traffic transfer at issue? AT&T's prospective filing leads to the inescapable conclusion that these obligations were not part of § 2.1.8 at the time the traffic transfer was requested. AT&T misquotes its tariff, and then misinterprets its meaning, in an attempt to assert

a newly minted defense after 10 years because it cannot explain its November 11, 1995 prospective tariff filing.[7]

AT&T also asserts that no benefits are left to plans after the traffic is temporarily transferred. AT&T is wrong. First, traffic always fluctuates; it is the plan that is the perpetual asset. Second, the obligations occur at fiscal year end, not monthly. Third, the benefits to plaintiffs are many, and included (1) CSTPII's are renewable at the aggregator's discretion; (2) grandfathered rights (for pre-June 17, 1994 plans); and (3) no security deposits because a plan's previously established credit history allows a merger into a new contract without posting a $13.5 million deposit.

In short, AT&T keeps shifting its defense in an attempt to find one that might work. Initially, AT&T allowed "traffic only" transfers without the transfer of S&T obligations. Id. at Ex. G. Then, in 1995, AT&T stopped traffic only transfers completely, arguing that § 2.1.8 did not allow such transfers and only allowed whole plan transfers.[8] When that argument appeared destined to fail in D.C. Circuit, AT&T argued that the transfer obligations vary depending on what is being transferred. Then, after AT&T realized that the D.C. Circuit intended to rule that traffic only transfers were permitted under § 2.1.8, AT&T concocted the defense that plaintiffs never intended to assume any obligations and, therefore, violated § 2.1.8. Finally, once AT&T realized that its argument that plaintiffs' TSA forms indeed assumed the only two obligations required by the tariff, it created its final defense (hopefully) that the subsection (b) obligation contained in § 2.1.8 (unexpired minimum payment periods) includes S&T.

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[7] The time for AT&T to assert this new defense has long expired. Section 2.1.8 gives 15 days to question the transaction, not 10 years.

[8] This position was obviously incorrect because documentation demonstrates that AT&T previously permitted traffic only transfer and then completely stopped that practice. Id. at Ex. H. There was never a requirement that S&T be assumed. That change in position created the narrow issue as to whether § 2.1.8 allowed traffic only transfers.

In reality, AT&T's new defense puts it in an untenable catch-22 position where it loses either way. Prior to this transfer, plaintiff did several other "traffic only" transfers to various aggregators. Under AT&T's theory, all S&T obligations must have previously transferred away, thereby leaving plaintiffs with zero S&T obligations. Using that theory would result in zero S&T obligations left to transfer to PSE in January 1995. Yet, AT&T now argues that CCI's plans still had S&T obligations, thereby confirming its real position: S&T obligations do not transfer on "traffic-only" transfers. AT&T has not produced even one routine "traffic only" transfer transaction to support its theory.

AT&T then presents a laundry list of all topics that were covered by plaintiffs before the FCC and the D.C. District Court, including: (1) pre-June 17, 1994 immunity; (2) the $50.00 per location transfer fee; (3) other comparable traffic transfers; and (4) AT&T transmittal 8179. AT&T argues that the FCC must also provide interpretation of these issues. AT&T is incorrect. Simply because plaintiffs raised additional arguments in support of its position before the FCC does not mean that it must go back and raise them again.[9] To the contrary, in light of the D.C. Circuit's ruling, there is no need to do so. It is clear that AT&T has violated the Act and the stay should be lifted in this Court so plaintiffs can press forward on the issue of damages.

On page 9 of its brief, AT&T again reasserts its ill-conceived notion that plaintiffs' alleged (but unsupported) fraudulent evasion of shortfall charges somehow survives the FCC's prior ruling. The FCC previously ruled that AT&T's sole remedy in this instance would be the temporary suspension of service and not a permanent refusal to transfer traffic. This ruling does not change

[9] Further, the FCC has already ruled on some of these issues. As we noted in our moving brief, the fact that the FCC specifically noted in its ruling that the transfer was requested before June 17, 1994 underscores the fact that the FCC understood that S&T obligations contained in the amended tariff did not apply to this transfer.

simply because the D.C. Circuit has now ruled that § 2.1.8 is applicable to this transfer. In fact, it reinforces it. There is no reason to petition the FCC to rule on that which it has already ruled.

LEGAL ARGUMENT

THIS COURT MUST VACATE THE STAY

AT&T's argument that this Court should not vacate the stay in this matter stands the case on its head. AT&T states "it has never been disputed in this case that transfers of traffic are permissible under § 2.1.8 when the associated liabilities are assumed." DB at p. 11. However, AT&T incorrectly asserts that the "associated liabilities" must include S&T. In reality, plaintiffs' nine TSA forms show clearly that it intended to transfer the only two obligations under § 2.1.8, which does not include S&T.

Amazingly, AT&T tries to suggest that the D.C. Circuit ruling was somehow a "win" for it. That is simply not the case. AT&T states that "the D.C. Circuit has strongly indicated that § 2.1.8 authorized AT&T's actions." DB at p. 12. AT&T must be reading a different opinion. The D.C. Circuit ruled that § 2.1.8 was applicable and permitted plaintiffs to transfer traffic only. It made no other findings and does not suggest in any way that § 2.1.8 allowed AT&T to refuse to move the traffic.

Next, in subsection A of its Legal Argument, AT&T makes the wishful argument that the D.C. Circuit has deemed plaintiffs claims as "likely meritless." Once again, AT&T places a spin on the D.C. Circuit's opinion that simply is not there. All the D.C. Circuit stated was that a transfer under § 2.1.8 requires a transfer of all the attendant obligations. The FCC said the same thing. Indeed, the FCC went further and defined precisely which two obligations are transferred. AT&T

now attempts to read into the tariff additional obligations that were not there at the time of the transfer.

Further, AT&T's assertion that the D.C. Circuit suggested plaintiffs' attempted an "end run around" the tariff misreads the opinion. A close reading shows that the D.C. Circuit was not referring to plaintiff's specific transaction but to the FCC's erroneous account transfer methodology. In this transaction, plaintiffs did not circumvent § 2.1.8 by transferring "one billed number at a time"; which the D.C. Circuit deemed would circumvent § 2.1.8; they did a bulk transfer wherein all obligations were assumed.

Finally, the two cases cited by AT&T in support of its position, Telecom Int'l America, Ltd. v. AT&T Corp., 67 F. Supp. 2d 189 (S.D.N.Y. 1999) and 800 Services, Inc. v. AT&T Corp., Civil Action No. 98-1539 (D.M.J. Aug. 28, 2000), aff'd, 2002 WL 215625 (3d Cir. Feb 12, 2002) actually support plaintiffs. In 800 Services Inc., Judge Politan ruled that only newly ordered plans after June 1994 were subject to S&T obligations. Thus, 800 Services, Inc.'s plans were subject to S&T obligations while plaintiffs' plans were not. Second, it is significant that neither case involved the FCC.[10]

In summary, all requirements and obligations within § 2.1.8 were met, The FCC relied upon § 2.1.8 to decide which obligations get assumed by PSE and determined that S&T do not get transferred on traffic only transfers; thus the DC Circuit's obligations assumed issue was answered. The FCC's error did not have a negative effect on AT&T. AT&T's use of an illegal remedy prohibits reliance on S&T in any event. Additionally, AT&T is not entitled to S&T because (1) the

[10] Plaintiffs also are in possession of deposition testimony in the 800 Services case showing that AT&T used aggregator's proprietary data to solicit end-users and drive aggregators into shortfall. It is axiomatic that "he who prevents a thing from being done may not avail himself of the non-performance which he himself has occasioned." See Keifhaber v. Yarnnelli, 9 N.J. Super 139, 142 (App. Div. 1950).

plans were pre 17th June, 1994; (2) due to AT&T's unlawful telemarketing using proprietary data, AT&T cannot rely on S&T; and (3) finally, AT&T clearly losses under the laws on ambiguity and explicity.

CONCLUSION

For all of the foregoing reasons, as well as for the reasons contained in our moving papers, we respectfully submit that this Court lift the stay previously imposed in this matter.

Respectfully submitted,

ARLEO & DONOHUE, L.L.C.

By: *s/Frank P. Arleo*
Frank P. Arleo

FPA:hm
cc: Richard Brown, Esq.

Background

800 Services was a toll free aggregator that initiated a Network Service Commitment Form contract with AT&T to be in the business of toll free aggregation in 1990. 800 Services Inc. undertook a toll free discount plan that entitled it to 28% off AT&T's base rates. When 800 Services originally signed its Network Services Commitment Form contract with AT&T the 3rd party end-users, which 800 Services accumulated on its discount plan, could not obtain on their own the discounts that 800 Services Inc., could provide as part of its group discount program. 800 Services, Inc was able to give to the end-users more than these end-users could get on their own directly with AT&T and still have enough left over to make it a very profitable business.

The 28% discount was a coupled tariffed offering under AT&T's tariff No 2, that was comprised of the following two discounts: 1) A Customer Specific Term Plan II (CSTPII) discount of 23% and 2) A Revenue Volume Pricing Plan (RVPP) discount of approximately 5%. 800 Services, Inc utilized enrollment forms that AT&T issued to aggregators called ENDUS FORMS to add or delete 3rd party end-users toll free service under the 800 Services Inc.'s discount group AT&T CSTPII/RVPP discount plan.

When 800 Services, Inc enrolled the end-users under its CSTPII/RVPP AT&T discount plan, 800 Services, Inc., would advise AT&T, on the enrollment form sent to AT&T, how much of the 28% discount AT&T should apply to each particular end-user.

800 Services utilized AT&T's Enhanced Billing Option (EBO) whereby AT&T continued to bill the end-users directly and the end-users would still continue to pay AT&T their toll free phone bill. Since AT&T was doing the billing and collecting of the phone service charges it was also AT&T's obligation to charge, collect and remit all applicable federal excise taxes and state sales taxes as an entrusted agent of the federal and 50 States taxing authorities.

AT&T offered aggregators like 800 Services, Inc. 4 different billing options under its Enhanced Billing Option. (EBO). The end-user would continue to pay AT&T but after enrollment onto the 800 Services, Inc.'s discount plan would then receive either a 15%, 17.5%, 20% or 23% discount applied to its toll free phone bill. The difference between the discount amount given to the end-user and the overall discount of 28% was the margin that 800 Services Inc. would make. Therefore 800 Services would either make 13%, 10.5%, 8%, or 5% respectively on each end-user. AT&T would credit 800 Services Inc.'s one master compensation account and then issue one monthly check to 800 Services, Inc for all the 800 Services Inc's customers , i.e. the end-user locations on its CSTPII/RVPP group discount plan.

Under this AT&T tariffed offering 800 Services Inc, was financially responsible to pay the entire phone bill if the end-user did not pay AT&T on time. The tariff mandated that AT&T would first attempt to collect the end-user bad debt directly from 800 Services Inc. AT&T typically dunned receivables for 90 days based on the aged outstanding balance reports AT&T furnished monthly to 800 Services, Inc. If 800 Services Inc, did not pay by check to AT&T the bad debt of its end-users then by the 90th day, AT&T would reduce the 5% RVPP discounts pool that were being applied to all the end-users bills. Therefore if the 800 Services Inc.'s CSTPII/RVPP discount plan was experiencing 1% bad debt in total, all the end-users would receive 1% less RVPP credit, not just the end-users who caused the bad debt. AT&T was thus compensated by providing less of a discount to all end-user locations. See **Exhibit A** bullet number 8. As discussed later it is important to note that this exhibit was submitted to the Federal District Court and the FCC by Combined Companies Inc. (CCI) as its position in a case vs. AT&T. CCI was owned by Mr. Larry Shipp who as latter explained appears to have co-operated with AT&T to defraud 800 Services, Inc.

Besides end-user bad debt (end-users not paying their phone bill on time) the tariff also provided that 800 Services, Inc would be responsible to AT&T for not meeting the plans fiscal year end volume obligation it undertook to obtain the 28% discount. AT&T's tariff provided a shortfall charge if the phone usage traffic volume obligation was not met. The shortfall charge was simply the difference between what aggregate phone usage volume was committed to AT&T and what actually was used by the aggregation of all end-users under the AT&T CSTPII/RVPP discount plan. A second charge for termination of the CSTPII/RVPP discount plan would be applicable if 800 Services Inc., terminated the plan before the 3 year contract ended. Termination charges were 35% of the volume committed. See exhibit A again however read the 10th bullet.

800 Services, Inc was responsible to AT&T for the bad debt and also the shortfall and termination charges. If bad debt, shortfall, or termination were present then AT&T under its tariff must go to its customer, the toll free number aggregator (800 Services, Inc), and if the aggregator does not pay AT&T then reduce the discounts applied to each location in the group plan. We will later see that the AT&T's tariff caps the amount that can be inflicted upon the end-users to the discount amount that the end-users were receiving. Therefore, the end-users could never be expected to pay more than the discount provided them. Shortfall charges under the tariff, was the obligation of 800 Services, Inc., not the end-users obligation.

What is a CSTPII/RVPP Plan Restructure and How Does It Work?

It is again important to note that the following explanation of a restructure was also the position of Combined Companies, Inc (CCI) president Larry G. Shipp Jr. In fact this explanation was filed by CCI to the Federal District Court and the Federal Communications Commission. The relevance to CCI and Mr. Shipp will be discussed later.

800 Services Inc. originated its' CSTPII/RVPP plan in 1990. This a very important fact because its plan had special grandfathered benefits under the tariff. It is well established FCC law that

any substantial changes to a phone carriers tariff are always done on a prospective basis. AT&T's Pittsburgh, PA billing office kept track of when all CSTPII/RVPP discount plans originated into the marketplace by the RVPP ID, often referred to as the VPP, issued by AT&T when originating the plan. AT&T's Revenue at Risk Report for July 1994 bill date shows all of AT&T's toll free aggregators CSTPII/RVPP plans that were already in effect as of July 1994. 800 Services, Inc's CSTPII/RVPP plan ID 3093 is already included in AT&T's database as of 1990, see **Exhibit B.**

On the AT&T Network Services Commitment Form the box NEW ORDER was indicted if it was a NEW Plan being originated into the marketplace.

If an aggregator such as 800 Services Inc., increased it commitment during a 3 year contract and started another 3 year period and used its originally issued RVPP ID this would be called a restructure. Using the same originally issued RVPP ID mandated that the plan would still be **subjected to the tariff laws when originated and thus be grandfathered to certain tariff changes.**

The following must be understood before the fraud perpetrated upon 800 Services, Inc by AT&T and CCI's Larry G. Shipp is explained.

The RVPP ID that was issued to 800 Services was plan ID 3093 and remained 3093, thus 800 Services, Inc was **grandfathered** to a critical tariff change**.** The fact that 800 Services Inc.'s plan was ordered prior to June 17th 1994 is significant. CSTPII/RVPP plans that were ordered prior to June 17th 1994 only had to meet fiscal year end shortfall commitments. CSTPII/RVPP plans that were ordered and "marked new" on AT&T's contract after June 17th 1994 had to meet more arduous monthly pro-rata commitments if the plans were **restructured before the fiscal year ends,** as opposed to pre June 17th 1994 fiscal year end commitments It is critically important to understand what a restructure is and how it works.

"Restructuring"---"Upgrading"---"Discontinuance Without Liability"

The word "restructuring", the word "upgrade", and the phrase "discontinuance without liability" all mean the same thing. Restructuring was the common business vernacular used between AT&T management and its aggregator customers. "Upgrade" is the term used on the AT&T Network Services Commitment Form contract with its aggregators that enacts what is referred to in the marketplace as a restructure. "Discontinuance Without Liability" is the term used within AT&T's Tariff No. 2 that defines in tariff terms what a restructure is. These terms are all synonymous.

A pre-June 17th, 1994 newly ordered RVPP ID could be restructured without shortfall penalty before the fiscal year end true-up date. Shortfall penalties on pre-June 17th, 1994 ordered plans could only be assessed against them if the plan went **past the 12th, 24th, or 36th month;** therefore if the plan was restructured before these shortfall fiscal year end true-up months, there could never be a shortfall penalty inflicted by AT&T against the aggregator.

The aggregator's volume commitment for a 3 year CSTPII/RVPP plan went down by 1/36th each month, whether or not the plan had any account usage volume on it. Actual phone usage had no bearing on the retirement of volume commitment when doing a restructure. It was time that retired AT&T volume commitments, not the volume of phone usage when restructuring applied.

For example, with a three year commitment of $12,000 per year ($36,000 over 3 years), if an aggregator wanted to restructure its' volume commitment at the end of the 11th month of the first year, it would take the remaining 25 months x $1,000 ($25,000) and commit to another three years at about $8,000 a year ($25,000 divided by 3 equals about an $8,000 yearly commitment for the existing CSTPII RVPP ID when restructured). In this example the yearly commitment went down from $12,000 a year to about $8,000 per year, no matter if the aggregator was over or

under its volume commitment up to the date of restructuring. Even if the aggregator had phone usage volume of $36,000 by the 11th month of the first year and thus already met AT&T's 3-year volume commitment within the first 11 months, the aggregator didn't get credit for this. The volume commitment level on a restructured plan was strictly calculated based upon the remaining months of the 3 year volume commitment over another 3 year period.

It didn't make a difference if the aggregator had $1000 of total usage before the 11th month; pre-June 17th, 1994 ordered plans had NO MONTHLY PRO-RATA shortfall obligations.

The aggregator didn't need to be doing 11/12th's of the volume commitment when restructuring the remaining 25 months of the 36 month time commitment when restructuring in the 11th month of the first year. Only on a POST Originated June 17th 1994 newly issued RVPP ID plan would the aggregator have to have 11/12th's of its yearly commitment made at the time of restructuring. In the example, the aggregator would have to be doing 11/12th's of the yearly $12,000, which would be $11,000 pro-rata commitment when restructuring if the RVPP Plan ID was originated after June 17th, 1994.

Pre-June 17th 1994 originated plans were grandfathered until the RVPP ID no longer was in existence. Since the volume commitment continually went down when restructuring the aggregator could restructure until there was no commitment left. This was imposed by the FCC due to the fact that these aggregator business people when originating these commitments with AT&T under one set of rules, including posting security deposits, should not be forced to have the rules of the game changed in mid-stream.

As Judge Politan Decision in the NJ Federal District Court stated in reference to these CSTPII/RVPP plans:

"Rules should not be changed in the middle of the game; and certainly not without notice."

It was recently discovered in July 2006 that over a dozen AT&T managers explained on audio tape that AT&T went by the RVPP ID code assigned to the plan when the plan originated into the marketplace to determine what tariff rules the plan was under. The tariff mandates that you must take a new RVPP discount plan when originating a new CSTPII/RVPP plan and this is one of the reasons why, so AT&T can keep track of the plans origination dates. AT&T tariff section 3.3.1.Q covers the rules when ordering a new CSTPII plan. When you order a new CSTPII you have to order a New RVPP ID; see Exhibit C.

A restructure is stated in the tariff as a CSTPII/RVPP contract of greater value, and on the AT&T Network Services Commitment Form contract as an upgrade. In the example the restructuring decreased the yearly commitment but it increased the remaining commitment. We gave an example of the $12,000 a year CSTPII RVPP plan being restructured in the 11th month to about $8,000 a year commitment; $25,000 /3 would actually give you $8,333 per year commitment. However, an AT&T customer had to increase its yearly commitment to one of published AT&T tariff commitment levels. In this example then, there is a $10,000 a year level commitment in the tariff that would be subscribed to instead of the $8,333 figure. In this example the yearly commitment went down by $2,000 per year, ($12,000 to $10,000); however there was an **increase in the overall commitment** from originally having 25 months left at $1,000 per month, $25,000 total, to the new $30,000 commitment. (New term assumption starting date AT&T referred to as (TASD) would result in a contract of 3 years x $10,000 per year = $30,000). Therefore, the yearly commitment went down by $2,000 but the total commitment went up by $5,000 (30,000-25,000), **so accordingly. Thus AT&T refers to it as an UPGRADE on its' Network Services Commitment Form contract.**

The tariff and the AT&T Network Services Commitment Form contract do not use the word restructuring but all of AT&T's managers referred to this tariff maneuver as a restructure. When

you extend your time commitment to start another three year period you are given a new Term Assumption Starting Date (TASD). The plan re-starts another 3 more years, but it is not given a new RVPP ID. Technically, according to the Network Services Commitment form, it is an "Upgrade" of the existing plan, NOT a new plan.

Restructuring in AT&T contract terms was an UPGRADE of a plan, and under the tariff it was a "Discontinuance without liability" of an existing CSTPII/RVPP in conjunction with an order for a CSTPII/RVPP with a total revenue commitment over the full term at least as large as the remaining revenue commitment of the existing plan, prorated according to the number of months remaining in the term.

See **exhibit D** a letter to 800 Services, Inc from its AT&T account manager Anna Nicoletti which explains that the commonly used business word "restructure" in tariff terms is a "discontinuation of AT&T's 800 Customer Specific Term Plan II – without Liability." See at **exhibit E** the actual AT&T tariff section 3.3.1.Q.4 concerning AT&T's 800 Customer Specific Term Plan II – without Liability.

Attached as **exhibit F** is a letter from an AT&T senior manager Joyce Suek that AT&T never produced at discovery also copied to her co-managers (Lisa Hockert & Joe Fitzpatrick) that was sent to a CSTPII/RVPP aggregator Winback & Conserve Program, Inc., regarding a restructured CSTPII/RVPP plan. In the opening paragraph AT&T's Ms. Suek states that enclosed is the AT&T Network Services Commitment Form and she also notes right in the business letter that this is a **restructure** for March of 1995. Notice the second page of this exhibit shows that the box **UPGRADE** was checked off. This shows the association that in AT&T contract terms a restructure is an **UPGRADE** of an **existing** plan. Notice in the upper right hand corner of the AT&T Network Services Commitment Form contract it asks for the Plan ID No. and on an upgrade the **existing** RVPP plan ID would be utilized. AT&T did not produce any of these

documents during discovery. If the aggregator wanted a NEW plan the NEW ORDER box on the Network Services Commitment Form would be checked and the RVPP ID box would be left blank, and AT&T would have to originate and assign a new RVPP ID and this would be a new plan subject to the AT&T tariff laws at that time.

Notice the AT&T Network Services Commitment form at **exhibit G** which was submitted by 800 Services, Inc on July 22, 1994. Notice on this contract, as the previous restructure/upgrade exhibit that the box UPGRADE was checked off; the "New order" box on the AT&T contract was not checked, therefore it is a restructure of an existing plan. Also notice that in the upper right hand corner the existing plan ID is clearly utilized 003093. Also notice on 800 Services, Inc's contract with AT&T that in the middle of the page 800 Services, Inc has circled annual commitment, and entered 3,000,000; the monthly option was not selected. This contract was approved by AT&T head manager Scott London as signed on the lower right.

It has been discovered by 800 Services, Inc in July 2006 that another aggregator Winback & Conserve with the same CSTPII/RVPP discount plans as 800 Services, Inc., was allowed by AT&T to restructure its plan 3782 as indicated at exhibit F, but 9 additional plans throughout 1995 and up till June of 1996. The Judge Politan March 5th 1996 decision ordered AT&T to transfer account traffic on 9 CSTPII/RVPP plans into PSE's 66% AT&T Discount plan ID 516 in Jan. of 1995. CCI and the Inga Companies were permitted to restructure and merge their CSTPII/RVPP plans but 800 Services, Inc was denied using the same exact method. The March 1996 Judge Politan decision lists the following 9 CSTPII/RVPP plans that were left in March 1996: 1351, 2828, 1583, 3124, 2430, 3663, 3468, 3524 and 2829. Absent from this list of plans is plan ID number 3782 restructured in February 1995 and AT&T confirmation letter received on July 12th of 1995. The reason why CSTPII/RVPP plan ID 3782 is not listed in the 9 plans ordered by the Court to have account traffic transferred is because that plan AGAIN was merged

and restructured into one of the remaining 9 plans before the March 5th 1996 District Court Decision. When you merge two or more CSTPII/RVPP plans together you have to restructure the one plan that is remaining over another three years. The Inga Companies and CCI used AT&T Network Service Commitment Forms in 1995 to restructure at least 10 CSTPII/RVPP plans and AT&T never assessed shortfall charges against them but did to 800 Services, Inc. When AT&T settled with CCI's Mr. Shipp in July of 1997 there were only 5 CSTPII/RVPP plans left: 3663, 2430, 3124, 2829, and 3524. Therefore the Inga Companies and CCI were able to restructure without charges after 800 Services, Inc. was denied in July of 1994. In fact at least four of the Inga Companies plans that were decided by the FCC as pre June 17th 1994 plans had ID numbers that were higher than 800 Services, Inc's VPP plan ID of **3093**. AT&T issued these VPP ID's chronologically so the FCC would also agree that 800 Services. Inc's plan was also grandfathered.

Thus AT&T violated Section 202 of the Communications Act for engaging in discriminatory practices, as it had allowed other aggregators which owned CSTPII/RVPP plans, originated into the marketplace after 800 Services, Inc's plan, to restructure without shortfall charges after June 17th 1994 but not 800 Services, Inc. The fact that Winback & Conserve Program Inc., and CCI were allowed to restructure at least 10 CSTPII/RVPP plans without shortfall and termination charges AFTER 800 Services, Inc was not allowed to do even one plan is discrimination under section 202 of the Communications Act.

In November of 1995, 18 months after 800 Services, Inc did a proper restructure AT&T's tariff section 2.5.18 seen here as **exhibit H** clarified that no shortfall charges should have been assessed against 800 Services, Inc. This made it very clear regarding no shortfall charges on pre June 17th 1994 ordered plans that are discontinued without liability.

"If the Old Plan includes an annual revenue commitment, a Shortfall Charge will apply as provided in 1, following. **The shortfall charge will not apply in connection with the discontinuance of a CSTPII that was ordered on or prior to June 17th, 1994."**

The law could not be clearer 800 Services, Inc's CSTPII/RVPP plan was a **restructured** plan that maintained its grandfathered pre-June 17th 1994 restructuring benefits.

Audio Tape Transcriptions on Restructuring Submitted by CCI to Federal District Court -Position Taken by CCI's Owner Larry Shipp

800 Services Inc has also discovered in July 2006 the following excerpts of audio taped conversations between a Mr. Inga, and several different senior AT&T managers regarding what AT&T's position was on CSTPII/RVPP plan restructures. Mr. Inga owned One Stop Financial, Inc, Group Discounts, Inc, Winback & Conserve program, Inc, and 800 Discounts, Inc., further referred herein as the "Inga Companies". The Inga Companies subscribed to the same type CSTPII/RVPP plans owned by 800 Services, Inc.

The Inga Companies and Combined Companies, Inc. (CCI) which was owned by Larry Shipp Jr., were joint plaintiffs against AT&T. The following audio taped transcriptions were **submitted by CCI** and the Inga Companies to the FCC seen here as **exhibit I,** in their suit against AT&T which started in 1995 and is still in litigation. AT&T as well as the Federal District Court has a copy of the audio tapes and the transcripts that were transcribed by Rizman, Rappaport, Dillon, & Rose Certified Court Reporters. 800 Services, Inc just learned in 2006 that AT&T had these tapes prior to 800 Services, Inc's discovery request but again AT&T failed to produce the tapes or the transcriptions of the tapes.

AT&T Account manager Joseph Fitzpatrick 30+years with AT&T:

Joe Fitzpatrick: If you get a new VPP number, you get a new plan. If you keep the same VPP number only with a new start date, it's not a new plan. So if they should give you a new plan VPP number....

Mr. Inga: Yeah
Joe Fitzpatrick You were given a new plan.
Mr. Inga: Alright but say the VPP stays the same.
Joe Fitzpatrick: Stays the same, all you have then is a new TASD –Term Assumption Starting Date, you have and original plan whatever TAS you wanna call that an ABC plan or whatever but its, its just a new TAS date. If you were grandfathered, you know how that game is played.
Mr. Inga: Now what I am saying is this, theoretically, there can never be a penalty assessed on a restructured plan because that plan—because AT&T has already interpreted that a restructure is not a new plan, that TAS date will start but the VPP ID, VPP dictates whether it's a new plan or not.
Joe Fitzpatrick: If you kept the same VPP number---
Mr.Inga Yes.
Joe Fitzpatrick: The plan that you started prior, you know in June of '94, prior to 6/17 **as long as that VPP number doesn't change**, they can track back in the system and say that was a – they can show when it was originally started, it was a pre 6/17 plan, it's grandfathered. True, you may get new TAS dates every time you restructure and as long as you do the restructure---if you time it right, if you screw up somehow and don't time it right, that system is gonna kick in and hit you for shortfall. So you just need to, you know, keep your clock there to tell you when to restructure.
(Tape 7 at 6-7: Transcribed by Rizman, Rappaport, Dillon, & Rose Certified Court Reporters)

800 Services Inc. was also not provided during discovery with this:
As stated by AT&T's Tom Freeberg an AT&T Division Manager:

Mr. Freeberg: Iam going to follow the tariff. The tariff says--- that a restructure is not a new account…
Mr. Inga : It does not ---Tom, it does not say that. Where in the tariff does it say a restructure is not a new plan? It does not say that.
Mr. Freeberg: "I'm, I am not saying verbatim. I am saying that the corporation is stating the tariff indicates that a restructure is not a new plan, that it –it is—continuous."

The confusion here was that the tariff does not use the word Restructure. (Transcript of tape recording Tape 26 and 27 at 66 Transcribed by Rizman, Rappaport, Dillon, & Rose Certified Court Reporters)

800 Services Inc. was also not provided during discovery with this:
Another conversation with AT&T provisioning Manager Lisa Hockert:

Mr. Inga: "Fine But it's ---it involves the same issue. It's the same issue. I restructured my contract to be able to upgrade the term plans before 1583 was restructured—"
Lisa Hockert: "The bottom line, Al, is that a restructure is not considered a new plan---simply a restructure, 1583 was restructured…. That's what you are missing, Al, and this is the last time we're going to say it because we're not going to---it anymore. Restructure is not a new plan, period… I take my direction from Rich Kurth directly. The bottom line, Al, is that restructure at that time we did consider it new. It's not new. That's the bottom line. It's not new. All the talking in the world isn't going to change it."

Transcript of tape recording Tape 26 and 27 at 98-102 Transcribed by Rizman, Rappaport,

Dillon, & Rose Certified Court Reporters)

800 Services Inc. was also not provided during discovery with this:
Conversation with AT&T account manager Maria Nasciemento:

Mr. Inga: The tariff did not change. Your interpretation of it changed.
Maria Nasciemento: Not my interpretation of it. I'm looking at it for the first time. And it's saying you have to have a new CSTP plan to bring in the LSTP's to.
Mr. Inga: Fine.
Maria Nasciemento: You don't have a new one
Mr. Inga: Well, what do you mean? Why isn't it new?
Maria Nasciemento: I don't know. Its reconstructed. Recontructed is not new.
Mr. Inga: Restructured.
Maria Nasciemento: Restructured.
Mr. Inga: Restructured. Well, it's been---it's
Maria Nasciemento: It's not new.
Mr. Inga : Restructured and new, you take--- when you restructure a contract, it becomes a new three year contract with the same obligations as a new—
Maria Nasciemento: No it's not
Mr. Inga: It's the same exact thing. It's a new three year commitment to AT&T.
Maria Nasciemento : No it's not.
Transcript of tape recording Tape 26 and 27 at 123–125 Transcribed by Rizman, Rappaport, Dillon, & Rose Certified Court Reporters)

800 Services Inc. was also not provided during discovery with this:
The following are relevant quotes from the audio tapes of AT&T managers which AT&T and the

Federal District Court also have.

Tape 1 Side B Tom Umholtz (Senior Account Manager):"Restructuring definitely allows you to NOT pay the penalty."

Tape 7 Side A Joe Fitzpatrick (Direct Account Manager): "[You] can restructure forever with no penalties as long as the RVPPID stays the same, you will always be a pre-17th plan." (Emphasis added.)

Tape 13 Side A& B Joe Fitzpatrick: "Restructuring to avoid shortfalls can be done."

Tape 14 Debra Kibby (Account Provisioning Manager):"Restructuring is not a new plan, this has always been like this in the tariff."

Tape 15 Side A Joyce Suek & Lisa Hockert (Account Provisioning Managers):

"Restructures are not new plans."
Tape 15 Side B Joyce Suek:"Plan ID remains pre-June 17th, 1994 even after restructures."

Tape 22 Side A Joyce Suek: "Need a brand new CSTP plan with a brand new RVPP ID to acquire term contracts of AT&T customers to the aggregator plan".

Tape 22 Side A Joe Fitzpatrick:
"Work procedure issued from AT&T product house that restructures are not new plans."

Tape 23 Side A Janis Bina (Credit and Collections Manager):"Restructures are not new plans"

Tape 23 Side A Maria Nascimiento (AT&T Manager): "You will get paid on back end of promos, therefore the restructures have to be considered not new. If they were new then you wouldn't get paid."

Tape 25 Side B Greg Brown (AT&T National branch manager overseeing all resale and aggregation): "Restructures allow the aggregator to keep lowering commitment downward to avoid shortfall."

Tape 27 Side A Ron Orem (AT&T National Division Manager Head of Specialized Markets): In a conversation regarding AT&T's reinterpretation of their tariff saying that restructures are now considered new, but without AT&T's having filed a tariff revision with the Commission to change these terms, Mr. Orem admits that - "Giving you [the undersigned] an advanced warning would have made a lot of sense."

Tape 28 Side A Joyce Suek:"Post plans are ordered new only after June 17th 1994."

Tape 30 Side A Maria Nasciemento & Joseph Fitzpatrick:"New plan means brand new, the plan ID was never in existence before."

Tape 31 Side A Joe Fitzpatrick and Marie Nasciemento: On this tape a discussions is recorded about a special promotion promo that paid a bonus on a new plan. AT&T denied the Companies the bonus on a restructured plan at the time claiming in direct contradiction of itself that the plan was not considered new and hence not entitled to the bonus.

Tape 33 Side A Andrea Anton (Combined Companies, my former co-plaintiff's account manager): "Pre June 17th plans are always pre-June 17th plans even after restructuring!"

AT&T Telemarketed 800 Services, Inc.'s Customers

800 Services, Inc, was never provided during discovery the following testimony from an AT&T account manager who stated AT&T used all aggregator's proprietary data to solicit end-users

and drive aggregators into shortfall. Additionally, **exhibit J** is a detailed transcript of a 3 way conversation with AT&T account manager Joseph Fitzpatrick, Al Inga of the Inga Companies, and Clarence an AT&T telemarketing manager.

Clarence states that AT&T is directly giving his marketing company the aggregators data that by law is suppose to be protected. When Joe Fitpatrick was told that AT&T should have done the program to protect the aggregators base of customers 3 years prior Mr. Fitzpatrick stated:

"Oh no argument Al. No argument here."

When Mr. Fitzpatrick was told that these solicitations are going on constantly all day long. Mr. Fitzpatrick states: "Yeah I believe you. You know you don't have to tell me that. I've heard it from other customers." One of these other customers was 800 Services, Inc., but these audio conversations regarding any knowledge of soliciting 800 Services, Inc's accounts, that AT&T had in its possession were never divulged by AT&T during discovery.

Mr. Fitzpatrick also stated:
"They have to figure out a way of getting this on there to prevent screens coming up in all the sales offices and some other offices but allowing the information to come up on the screen in Minneapolis and some of our billing centers."

Whether AT&T illegally prohibited aggregator's access to its customers on term plans without liability or directly illegally used aggregator's proprietary information to solicit end-users off the CSTPII/RVPP plans, it is axiomatic:

"he who prevents a thing from being done may not avail himself of the non-performance which he himself has occasioned." See Keifhaber v. Yarnnelli, 9 N.J. Super 139, 142 (App. Div. 1950).

CCI's position was that Restructured plans were not new and thus Immune from Shortfall due to AT&T not allowing direct AT&T customers under AT&T LSTP contract to enroll with aggregators without Penalty on Restructured Plans.

The tariff is very clear that AT&T customers who were under term contracts with AT&T, called Location Specific Term Plans (LSTP's), could leave their contracts with NO penalty if the aggregator was willing to absorb their volume commitment into the aggregators CSTPII/RVPP plan. The AT&T tariff only allowed this if the aggregator was taking out a NEW Plan with AT&T, with a brand new issued RVPP ID, not a restructured plan. In the first month of a new

CSTP II RVPP plan the tariff allows aggregators to enroll these end-users into CSTPII/RVPP plans without the end-user receiving a discontinuation penalty. Being able to enroll these end-users was obviously a major benefit to an aggregator to have a new plan and not a restructured old one because most of the marketplace by 1995 was under LSTP contracts.

If restructures plans were considered new, the aggregators like 800 Services, Inc., would have been able to bring in a tremendous amount more in new business.

But AT&T interpreted restructures of existing CSTPII RVPP plans as OLD plans so aggregators could not take these end-users out of their LSTP contracts. May 1, 1993 was the first day of toll free portability. This was the first time since toll free service was implemented in 1967, that the user could keep their number and change their carrier. AT&T went on a campaign to lock as many of their customers under contract as possible to protect them from competition. AT&T was very effective in this and locked up a good 60% to 80% of the toll-free volume was under term contracts with AT&T. Even if restructures were considered as new plans by AT&T this would mean that AT&T illegally prohibited aggregators from marketing to AT&T's customer base. This in itself would have allowed aggregators to meet their volume commitments without restructuring.

After 800 Services Inc's conversations with AT&T management it became an accepted belief that on restructured plans there would be NO shortfall inflicted for timely restructures of pre June 17th 1994 issued RVPP ID Plans. However the aggregators could not enroll AT&T direct customers who were under LSTP contracts.

AT&T wanted 800 Services restructured plan to be considered new and old at the same time to have the beast of both worlds. AT&T wanted <u>restructures considered new</u> to make the plans post June 17 1994 to meet monthly as opposed to fiscal year commitments; but <u>considered old</u> so as

not allow 7800 Services, Inc to acquire AT&T customers which were under contract with AT&T.

CSTP II RVPP OPTION B VS. CSTPII RVPP

Aggregators actually all have CSTP II RVPP Option B plans. **Additional new information has been discovered that AT&T never produced during discovery:** Attached as **Exhibit K** is an internal AT&T document that on the bottom is marked AT&T proprietary given to the Inga Companies by AT&T.

The document states on the first page of the exhibit the aggregator will be identified by the VPP. This was done to track what tariff laws the plan fell under. The document states at 4.36.10 that the:

"CSTPII Option B will have an annual true-up" not a monthly commitment. Section 4.36.12 of this document under Migration explains that the aggregator can restructure/upgrade without penalty. On page two of this exhibit at 4.36.14 it explains that the aggregator will not get a bonus, ("no additional ½% credit will apply.") This again is because the aggregator is deemed by AT&T not to have a new plan but a restructured old plan. Under this section we see:

"the customer, (800 Services, Inc) will assume all financial responsibility for designated accounts in the plan and will liable for all charges incurred by each location under the plan."

Thus AT&T should not have placed charges on 800 Services, Inc.'s bills in excess of the discount amount; and only after it first attempts to collect from 800 Services, Inc. As stated on the bottom of this second page of the exhibit:

"For billing purposes such penalties shall reduce any discounts apportioned to the individual locations under the plan."

Page three of the exhibit K states:

"The customer "MAY REUSE" their existing RVPP plan".

The ability to reuse the aggregator's RVPP ID was a huge benefit for the aggregator because the tariff rules got tougher for aggregators as the years went on. If an aggregator was issued a brand new RVPP ID it could lose its June 17th 1994 grandfathered status. AT&T was doing this to get aggregators not to move their accounts to other phone carriers because the portability of toll free service had recently been enacted allowing end-users to change their toll free carrier but to keep their toll free number. AT&T set up the EBO benefit because the aggregators were being solicited by MCI, Sprint etc.

Also unknown to 800 Services, Inc and not produced by AT&T during discovery was the fact that CCI's Larry Shipp also filed with the NJ Federal District Court the following position regarding the Payment of Promotional Money thus substantiating why restructured plans were not new plans and remained pre-June 17th 1994 grandfathered.

Payment of Promotional Money: AT&T ran promos and paid a signing bonus to newly issued RVPP ID plans if it was a new plan. AT&T would not pay if it was a restructured plan where the RVPP ID was already in existence, as seen in previous exhibit.

Payment of Back End Promotional Monies Proper On Restructuring as Plans are NOT New.

AT&T ran several promotions. These promos had a front end signing bonus and a backend 13th month bonus. The tariff was very clear that the back end money would not get paid if the plan was no longer in effect.

The record clearly shows that 800 Services, Inc chose to keep its RVPPID 3093 and therefore its pre-June 17th 1994 grandfathered restructuring benefits. Thus its plan did not have to meet pro-rata monthly commitments by keeping instead of getting a newly AT&T issued RVPP ID.

In summary 800 Services Inc, was allowed under AT&T's tariff to restructure without penalty, and effectuated and executed the restructure by properly completing AT&T's Network Services Commitment Form contract and thus should never had shortfall inflicted upon its plans. 800

Services, Inc was duped by AT&T. 800 Services Inc., was then defrauded by both AT&T and CCI during the 800 Services Inc., trial against AT&T who was "in cahoots with" CCI's Mr. Shipp a fact which was unknown to 800 Services Inc., and the Court.

Combined Companies Inc.,Joint Case with the Inga Companies Against AT&T and how it Affected 800 Services, Inc.

CCI and the Inga Companies were co-plaintiffs in a suit filed in 1995 against AT&T in NJ Federal District Court Case 95-908 before the same Judge Politan as the 800 Services, Inc-AT&T case. The 1995 joint petition of the Inga Companies and CCI, stemmed from their joint attempt to move end-user accounts to a deeper discounted AT&T CT-516 plan of 66% that was owned by Public Services Enterprises (PSE). AT&T during 1995 was not allowing any aggregator to transfer just the accounts from its plans without also transferring the plan also. 800 Services Inc., also told AT&T that traffic only transfers were not being allowed by AT&T. The deposition statement by 800 Services, Inc's president Phil Okin shows that 800 Services, Inc's first priority was to transfer just the traffic (accounts) without the plan, however AT&T was not allowing this.

It was just decided in 2005 by the DC Court and discovered in 2006 by 800 Services the question in the CCI/Inga Companies case was resolved against AT&T as it relates to whether account traffic only can be transferred without the plan.

800 Services, Inc is only now learning that the following question asked by Judge Politan in 1995 was directed to the FCC on primary jurisdiction grounds:

> "whether section **2.1.8** [of AT&T's Tariff FCC No. 2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction."

In January 2005 The DC Court of Appeals issued its decision when doing judicial review of the FCC's decision of Oct 2003. Here are 4 statements from the DC Court:

> **I)** In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of "traffic.
>
> **II)** As the foregoing discussion indicates, we find the Commission's interpretation implausible on its face. First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and not just transfers of entire plans."
>
> **III)** "We conclude that traffic is a type of service covered by the transfer provision, and that the Commission's contrary interpretation would render the provision meaningless.
>
> **IV)** "Absent such reliance, the commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass **transfers of traffic alone**."

Therefore it is only now discovered in 2006 that 800 Services, Inc, was deprived of its first option of transferring its accounts without the plan due to AT&T's unlawfully denying account traffic transfers.

800 Services, Inc knew that AT&T was not allowing account transfers so it then attempted to transfer its plan and accounts through CCI, which was owned by Larry Shipp to PSE. CCI's Mr. Shipp was well aware of the Pre June 17th 1994 ruling that made CSTPII/RVPP plans immune from shortfall and termination charges due to the ability to restructure the commitments.

800 Services has now discovered that it was Mr. Shipp who advised Mr. Inga that when Mr. Shipp was working with Public Service Enterprises president Frank Scardino, that AT&T wrote into a settlement agreement with PSE that pre June 17th plans if timely restructured could never have shortfall or termination charges inflicted against it. Newly discovered in 2006 here as **Exhibit L** is an email sent from Mr. Inga to PSE's president Frank Scardino that reiterated and

affirmed a conversation that the two had regarding AT&T admitting in writing in its settlement agreement with PSE that no shortfall and termination penalties could be inflicted on restructured Pre June 17th 1994 plans. Mr. Inga called Mr. Scardino and said that Larry Shipp told him about AT&T counsels admission under non disclosure. Mr. Scardino admitted that yes that was within his settlement agreement with AT&T.

Never produced by AT&T during discovery with 800 Services, Inc, and included here as **exhibit M** are series of letters sent by CCI's Mr. Shipp to AT&T during 1995, 1996 and the beginning of 1997 just before CCI's Mr. Shipp settlement receiving money from AT&T. Mr. Shipps' position is extremely clear that no shortfall and termination charges can ever be inflicted on Pre-June 17th 1994 plans if timely restructured. The letters clearly show that Mr. Shipp was quite livid in his stance with AT&T, that pre- June 17th 1994 plans were grandfathered forever!

Additionally 800 Services Inc., has only recently discovered that besides the many letters from Mr. Shipp there were letters from the Inga Companies that CCI and AT&T were well aware of. Here as exhibit N is a letter faxed May 24th 1996 from the Inga Companies to AT&T's senior Counsel Edward Barrilari. The letter stated that there could be no shortfall charges on restructured pre June 17th 1994 plans.

Mr. Shipp also **had jointly submitted** with its co-petitioner the Inga Companies the following explicit irrefutable tariff evidence that shortfall and termination penalties can not be assessed on Pre-June 17th 1994 plans. Again it was CCI which submitted to the FCC that AT&T Tariff No 2 clearly shows at 2.5.8 c, the black letter law: **"the shortfall charge will not apply in connection with the discontinuance of a CSTPII that was ordered on or prior to June 17th, 1994."** Yes the evidence was overwhelming and quite explicit. The lower right hand corner of this exhibit shows that this was page 137 of the joint petition that CCI's Mr. Shipp jointly submitted with the Inga Companies; attached here as **exhibit H.** Notice in exhibit H that AT&T did not clarify its

tariff regarding restructuring being allowed until November of 1995; however 800 Services Inc, had already been unlawfully denied the restructure several months earlier in July of 1995, see exhibit D. It must also be noted that AT&T is still arguing today in the Inga Companies remaining case against AT&T that the tariff still allows AT&T to inflict shortfall against properly restructured plans even though the tariff clearly favors the aggregator. AT&T has never admitted what the tariff seems to make clear.

CCI's Mr. Shipp asks Mr. Inga to obtain a Signed Transfer of Service Agreement (TSA) from 800 Services, Inc's President Mr. Okin

CCI, obviously having clearly understood the tariff and having been involved with PSE, understood pre June 17th 1994 plans were immune from shortfall, and thus Mr. Shipp was agreeable to accept the CSTPII/RVPP plan from 800 Services, Inc; remember AT&T was not allowing traffic only without the plan transfers. Here as **exhibit O** is the form that 800 Services, Inc's president Phil Okin signed and gave to Mr. Inga in April of 1995, which then was sent to CCI's Mr. Shipp. Mr. Shipp then attempted to transfer the plan to PSE who had deeper discounts of at least 66% instead of the 28% that 800 Services, Inc. was receiving. AT&T denied the transfer of the plan.

800 Services, Inc.'s president Mr. Okin was totally confused regarding restructures as were most aggregators because AT&T was saying that restructures were both new and old plans. Mr. Okin was not certain he had a pre-June 17th 1994 issued CSTPII/RVPP plan simply because AT&T misled Mr. Okin and said 800 Services would get hit with shortfall charges.

As the newly discovered audio taped conversations indicate with AT&T's Ms. Lisa Hockert; AT&T had previo said that a restructure was a new plan but then **changed it mind** because aggregators were able to assume d AT&T customers who were under LSTP contracts without penalty. Since AT&T often liked to interpret its tari its benefit only Mr. Okin did the safe thing and asked AT&T. AT&T was holding all the cards. AT&T was d

the billing and it did whatever it wanted and this included simultaneously saying restructures were both new and plans. It couldn't simultaneously be both but AT&T was determined to have their cake and eat it too.

The record shows that on July 21st 1995 Mr. Okin sent a letter to his AT&T manager asking AT&T if he would be able to restructure its existing CSTPII "without any penalty." Exhibit D is the letter dated July 25th 1995 from AT&T account manager Anna Nicoletti to Mr. Okin. In the very first line AT&T acknowledges that Mr. Okin **specifically asked about restructuring** the contract due to AT&T's own flip flop of its tariff interpretation in July of 1995. Ms. Nicoletti states:

> "Your July 21st letter asks whether 800 Services, Inc will be allowed to restructure its existing CSTPII "without any penalty."

Ms. Nicoletti obviously did not understand restructuring because 3 days earlier Mr. Okin on July 22nd 1995 submitted a properly executed Network Services Commitment Form to restructure/upgrade/discontinue without shortfall charge liability. 800 Services, Inc was totally misled by the AT&T letter which Ms Nicoletti admitted was written by the AT&T legal department. The July 25th letter stated that 800 Services

> "will be required to pay any difference between its pro-rated annual commitment and its actual charges."

AT&T defrauded 800 Services Inc. and obviously violated its tariff by inflicting pro-rata monthly commitments, which is a violation of Section 203 of the Communications Act. It also violated Section 202 of the Communications Act for engaging in discriminatory practices, as it had allowed other aggregators which owned pre June 17th 1994 CSTPII/RVPP plans to restructure without penalty.

800 Services, Inc. knew that AT&T controlled the billing of its customers under AT&T's Enhanced Billing Option (EBO) and had to make a drastic decision. 1) AT&T would not transfer the accounts. 2) AT&T refused to transfer the plan, 3) 800 Services was being told that the end-

users were going to get hit with charges so it attempted to delete the accounts off its CSTPII/RVPP plan one at a time which is permitted under AT&T tariff section 3.3.1.Q.

800 Services Inc. first choice as the Phil Okin deposition stated was to do a bulk traffic transfer of its accounts under AT&T tariff section 2.1.8 but AT&T was not allowing it. 800 Services Inc. had built a solid reputation with its end-users and the last thing 800 Services, Inc wanted to hear was that AT&T was going to put huge shortfall charges on the bills of its end-users. AT&T deleted only some accounts off 800 Services Inc., plan despite the fact that AT&T has no proprietary interest in holding the accounts. Newly discovered evidence found here that AT&T refused to produce during discovery, here as **exhibit P,** is a letter from AT&T written the year 800

Services, Inc originated its plan that clearly states:

"As a result, that end-user loses his status as a customer of AT&T, giving you the control of the aggregated (Billing Telephone Number) to you, the aggregator, including the authority to add, delete, or change service for that BTN. Accordingly AT&T will honor all order activity related to a BTN included in your discount plan only from you—the service plan holder."

This letter was addressed to one of the Inga Companies but holds true for all aggregators. Additionally the Court can see exhibit A at bullet number 4 where it also states:

"The Customer may add or delete an AT&T 800 Service or Custom 800 Service under the plan"

When AT&T refused to transfer the traffic under section 2.1.8, deny the plan transfer, and also denied deleting accounts under section 3.3.1.Q, 800 Services, Inc filed suit on its own in the Federal District Court in Newark NJ and the same Judge Politan who had heard the Inga Companies/ CCI case heard the 800 Services, Inc case.

At this point the Inga Companies no longer had any contact with 800 Services, Inc. The Joint case between the Inga Companies and CCI was still being litigated before Judge Politan and produced in March of 1996 a decision that accounts could be transferred without the plan. That

decision was vacated by the Third Circuit and the question sent to the FCC. Unknown to 800 Services, Inc., the March 1996 Politan Decision related to the same issue of 800 Services, Inc won by co-plaintiffs against AT&T but AT&T still defrauded 800 Services Inc. while these issues were before the Court. The issue that was being argued was whether an aggregator could move just the accounts from its CSTPII/RVPP plan to PSE's CT-516 without the plan also being transferred. This was what 800 Services Inc. wanted to do but AT&T was denying all aggregators.

Judge Politan's favorable decision for CCI and the Inga Companies was appealed by AT&T to the Third Circuit where it was decided by the Third Circuit on primary Jurisdiction grounds that the case should be heard by the FCC and therefore Judge Politan's 2nd Decision in March of 1996 was vacated. The first Judge Politan decision in May of 1995 allowed CCI to become co-owners of the CSTPII plans that were previously owned only by the Inga Companies, and this decision was not appealed by AT&T.

In the Politan Decisions he noted:

District Court Quote: Submitted by CCI (Larry Shipp) to the FCC:

"In answer to the court's questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do **escape termination and also shortfall charges** through renegotiating their plans with AT&T."

District Court: Submitted by CCI (Larry Shipp) to the FCC:

"Suffice it to say that, with **regard to pre-June, 1994 plans,** methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff."

District Court: Submitted by CCI's (Larry Shipp) to the FCC:

"Commitments and shortfalls are little more than illusionary concepts in the reseller industry—concepts which constantly undergo renegotiation and **restructuring**. The only "tangible" concern at this juncture is the service AT&T provides. The Court is satisfied that such services

and their costs are protected. To the extent however that AT&T's demand for fifteen million dollars' security is premised on the danger of shortfalls, the Court finds that threat neither pivotal to the instant injunction nor properly substantiated by AT&T."

Obviously the 6/17/94 Ruling was well before 800 Services Inc.'s desire to transfer its accounts to the deeper discount plan of 66% offered by PSE. Therefore AT&T knew full well that by denying 800 Services, Inc, in 1995 it was against its tariff and of course CCI's Larry Shipp also knew AT&T had violated its' tariff and thus the Communications Act.

CCI Settles with AT&T
Co-operation and/or Discrimination Against 800 Services, Inc

800 Services, Inc has now discovered information that was not provided by AT&T that in July 1997 Larry Shipp unbeknownst to Mr. Inga entered into a non disclosure settlement agreement with AT&T and settled its share of its co-plaintiff claims against AT&T. CCI received a compensation package estimated at over $55 million from AT&T that included a cash payment to CCI and the waiver of all the shortfall charges that AT&T had placed on the plans. CCI's Mr. Shipp despite being so adamant that the shortfall charges AT&T inflicted on its Pre-June 17th 1994 plans were bogus got a pay off from AT&T and AT&T has publicly stated that CCI fulfilled its obligation to pay these charges in some fashion. This totally defies logic! If these charges were real why would AT&T need to pay Mr. Shipp cash! If anything Shipp would owe AT&T for its shortfall charges estimated at over $55 million. AT&T also dropped a slamming suit against CCI as well. AT&T simply needed Mr. Shipp to help AT&T defend itself. 800 Services, Inc., has just discovered that there was a deposition taken of Mr. Shipp by Mr Coven who was counsel for the Inga Companies, in a case filed by the Inga Companies against CCI. In this deposition taken of Mr. Shipp, Mr Shipp admitted that he had to continue to co-operate with AT&T as part of the AT&T-CCI 1997 settlement agreement.

Mr. Shipp stated at deposition:

> **They had asked me at one time or, in fact, referenced it within the agreement even that I would, ---I would cooperate with them."**

Also newly discovered by 800 Services, Inc., is the following: AT&T's counsel Richard Brown the same attorney who subpoenaed and possibly coached Mr. Shipp in Mr. Shipps' second deposition for the 800 Services, Inc. case, also admits Mr. Shipps' cooperation with AT&T. (AT&T June 2005 brief to Judge Bassler page 16 para. 1):

> Mr. Brown: "CCI has now resolved its obligation to pay shortfall charges **"in some fashion"**

There were tens of millions of dollars of shortfall charges that AT&T was claiming on the CCI-Inga Companies CSTPII/RVPP plans. AT&T claimed CCI was an asset less shell, obviously CCI did not pay in cash for AT&T's charges. This is what Mr. Brown was obviously alluding to when he stated "in some fashion." The only thing that AT&T wanted from CCI's was its co-operation consulting services to help AT&T defend itself; and defend AT&T is what Mr. Shipp did as he put on show during his deposition that was deserving of an Oscar to help AT&T. AT&T possibly reasoned that it was more certain that it would end up paying many more millions in damages if it didn't have Mr. Shipp in its pocket, than the chance that Mr. Inga finds out about the performance put on by Mr. Shipp during a deposition in the 800 Services, Inc. case. AT&T knew that only Mr Inga would have the Larry Shipp letters and evidence to compare Mr. Shipp's position before and after his settlement with AT&T and show the fraud perpetrated on the Court by AT&T.

Mr. Inga only heard about the AT&T –CCI settlement agreement because CCI's Mr. Shipp again violated a contract, this time with AT&T and bragged about the money he got from AT&T to a

mutual friend of Mr. Shipp and Mr. Inga. It should also be noted that CCI's Mr. Shipp entered into the settlement agreement with AT&T despite having signed a Mutual Confidentiality and Non Disclosure Agreement with Mr. Inga of the Inga Companies, which shows that their confidentiality agreement was still in affect when CCI accepted the AT&T hush money and turned informant and a co-operative witness. This violation of the Inga –Shipp agreement again speaks volumes of what Mr. Shipp did for AT&T's co-operation money. The Mutual Confidentiality and Non Disclosure Agreement at attached here as exhibit Q as on the second page it shows at number 7 that even after CCI's and the Inga Companies business relationship ended the confidentiality would survive.

AT&T also has become desperate to defend itself and violated the CCI-AT&T non disclosure agreement when AT&T counsel Mr. Richard Brown publicly wrote as **exhibit R** shows on July 30th 2004:

"The Inga Companies' letter also omits any mention of the fact that CCI entered into a settlement agreement with AT&T on July 1st, 1997, with respect to all its plans and accounts, including the plans that had been transferred to it by the Inga Companies in 1995. Pursuant to the settlement agreement, **CCI terminated all its plans with AT&T and released AT&T from all claims. In exchange, AT&T agreed to forgive millions of dollars of shortfall, termination, and other charges that were owed by CCI to AT&T under those plans and to make a settlement payment to CCI."**

A few things regarding AT&T announcement need to be addressed:

1) Conspicuously absent from AT&T announcement of settlement terms was the fact that CCI was mandated to co-operate with AT&T to defend AT&T against aggregators. CCI's Shipp admitted this at deposition and AT&T indicated this in June 2005 in a brief to Judge Bassler. AT&T's Jan 2004 letter attempts to con Judge Bassler into believing that CCI had settled the Inga Companies claims. Of course AT&T could not disclose and thus admit the fact that CCI was expected to help AT&T defend against the Inga Companies and 800 Services, Inc. because

AT&T would then be admitting that the Inga Companies obviously still had claims against AT&T. This again clearly shows how AT&T deceived the Court in regard to hiding Mr. Shipps' co-operation mandate that is within the CCI-AT&T settlement agreement.

2) This AT&T disclosure also shows that the shortfall and termination charges are obviously absolutely bogus! If these "millions of dollars of shortfall, termination, and other charges that were owed by CCI to AT&T" were legitimate why did AT&T also need "to make a settlement payment to CCI?" CCI and the Inga Companies suit against AT&T was not for damages it was to provision accounts as 800 Services Inc.'s claim was.

3) Further evidence that AT&T believed that the shortfall charges placed upon 800 Services Inc.'s end-users was bogus is the fact that AT&T did not apply federal excise taxes or State Sales taxes to the end-users bills. If the shortfall charges were actually legitimate one would think that AT&T as an entrusted agent of the IRS and all 50 States would have applied taxes on the shortfall charges. 800 Services Inc, was a NJ Corporation and AT&T's customer and was financially responsible for the shortfall if legitimate. NJ statute 54:32B-2 would indicate AT&T would have to apply sales taxes of 6% to the shortfall charges. The IRS code also seems to indicate that there should have been 3% federal excise tax. AT&T's decision not to apply taxes on these charges indicates that AT&T knew the shortfall charges were bogus and was not about to pay taxes of 9% on about $2 million dollars back in 1995.

Additionally AT&T must have also known that these shortfall charges were bogus on pre June 17th 1994 plans in the CCI settlement with AT&T. It would not seem logical that AT&T would say that CCI and AT&T exchanged non monetary value; AT&T's shortfall phone services for CCI's cooperation consulting services. If this were true that would mean that the IRS could say it was a taxable barter deal and both CCI and AT&T would have to pay corporate income taxes on

over $50 million dollars. Therefore it would be non sense to believe that AT&T actually would state within its non disclosure agreement with CCI that shortfall charges on aggregators pre June 17th 1994 plans were valid and pay about $25 million in taxes on a possible barter transaction back in 1997. Additionally AT&T did not apply federal excise taxes or State Sales taxes on the Shortfall charges those pre June 17th 1994 plans. If the shortfall charges should have been applied on these pre June 17th 1994 plans then AT&T would have had to pay 7% Florida Sales Tax and 3% federal excise taxes on over $55 million in billing. Since we doubt that AT&T would knowingly not pay many millions in taxes there can only be one answer: AT&T knew shortfall and termination charges on pre June 17th 1994 issued or restructured plans was bogus so no taxes were to be applied on something that was bogus. AT&T doesn't just settle with anyone under non disclosure and make payment to them such as a small asset less marketing like CCI if AT&T was not aware it was guilty of unlawful tariff maneuvers.

4) If these AT&T charges were legitimate than AT&T is guilty of Discrimination under Section 202 of the Communications Act. Very simply, if AT&T waived its so called legitimate charges for CCI AT&T is mandated under the law to waive these same charges for 800 Services, Inc. If AT&T states that CCI compensated AT&T for these charges by co-operating with AT&T to defend AT&T, AT&T thus also admits it worked in concert with Mr. Shipp to perpetrate a fraud upon the Court. AT&T is guilty of violations of the Communications Act either way.

It has just been discovered by 800 Services, Inc., that the Inga Companies continued to pursue its claims against AT&T after the CCI-AT&T settlement. On Oct 17th 2003 the FCC unanimously decided for the Inga Companies. The FCC also stated that the CSTPII/RVPP plans were issued **prior to June 17th 1994** communicating that the plans were immune from shortfall and termination charges. In fact the Inga Companies had a plan that was ruled pre June 17th 1994 that was plan ID 3663 which of course was originated after 800 Services, Inc's VPP plan ID of 3093.

AT&T issued these VPP ID's chronologically so the FCC would also agree that 800 Services. Inc's plan was also grandfathered.

From the FCC Ruling Oct 17th 2003 regarding Pre June 17th 1994 issue.

> **"Prior to June 17th 1994**, the Inga Companies completed and signed AT&T's "Network Services Commitment Forms for WATS under AT&T's Customer Specific term plan II (CSTPII), a tariffed plan, which offered volume discounts off AT&T's regular tariffed rates."

AT&T's Use of Illegal Tariff Remedy

800 Services, Inc. has just discovered that there was a decision that was made by the FCC in the Inga Companies case against AT&T that makes whether the shortfalls are real or not, a mute issue. In the Inga Case against AT&T the FCC decided that AT&T used an illegal tariff remedy. There is nothing in the AT&T tariff that explains what an illegal remedy inflicted by AT&T against its customer the aggregator provides. 800 Services, Inc would not know at the time that an AT&T illegal remedy would mandate that AT&T could no longer rely on shortfall even if it determined applicable.

AT&T under its tariff permanently denied the request to move accounts from the CSTPII/RVPP plan to CT516 of PSE. The same CT516 plan that 800 Services, Inc, wanted to transfer its accounts to from its' CSTPII/RVPP plan. The FCC stated that even if the plans were post June 17th 1994 plans and shortfall was legitimately anticipated, AT&T **was constrained by its tariff remedies** to only temporarily suspend service as opposed to their chosen approach of permanently denying the account transfer. This led to the FCC decision on Oct. 17th 2003 that decided that since AT&T used an illegal remedy that was not allowed under its tariff, AT&T could **NO LONGER RELY** on the shortfall. Thus 800 Services Inc.'s end-user account traffic should have been moved by AT&T because AT&T permanently denied 800 Services Inc., the ability to do a bulk traffic only transfer under AT&T tariff section 2.1.8.

AT&T's Appeal of the FCC's Decision to the DC Circuit Court

AT&T appealed the FCC decision and the decision went from one where the FCC stated that the account movement was not prohibited under AT&T's tariff to the DC Circuit decision where DC Circuit said that the account movement was expressly permissible under section 2.1.8. What happened was the FCC had erred and believed that the section that allowed "traffic only", without the plan account transfers was 3.3.1.Q. The Inga Companies and 800 Services, Inc., wanted to move its accounts under tariff section 2.1.8. The FCC decided that the 2.1.8 account transfer section used, was the wrong transfer section, but ruled in the Inga Companies favor by stating the transaction was not prohibited under the tariff. The DC Circuit looked at the tariff and vacated the FCC Decision saying that the FCC was wrong that 3.3.1.Q was not the tariff transfer section, but 2.1.8 was indeed the correct section. The Inga Companies attempted its traffic only transaction in Jan of 1995 and were denied by AT&T as AT&T stated that traffic only transfers were not allowed under AT&T tariff section 2.1.8. When 800 Services, Inc's Phil Okin was told that AT&T was no longer allowing traffic only transfers as AT&T had allowed in the past, 800 Services, Inc., had to give up this first option as stated in the Phil Okin deposition to go to option 2 of transferring the plan. As stated it has now been discovered in 2006 by 800 Services, Inc's president Mr. Okin that due to the 2005 DC Court Decision that AT&T unlawfully prohibited traffic only transfers. This is a clear violation of Section 203 of the Communications Act.

The DC Circuit Did Not Disagree on FCC's Illegal Remedy Position

It must also be noted that the Jan. 14th 2005 DC Circuit Decision did not disagree on the FCC's illegal remedy position. In the Inga Companies case the DC Circuit had only one remaining question that it wanted addressed regarding what obligations get transferred on transfers of accounts without the plan. The answers to these questions from AT&T and the Inga Companies are currently before Judge Bassler in the Federal District Court. The parties are waiting for oral

argument to be scheduled in that case. Despite these issues remaining open and all cases going against AT&T, AT&T still put 800 Services, Inc out of business.

AT&T Also Uses Illegal Remedy Against 800 Services, Inc.

The fact that AT&T used an illegal remedy against 800 Services, Inc. means AT&T can not rely on its shortfall charges even if 800 Services had a post June 17th 1994 plan.

It is crucial to understand that under the tariff when an end-user enrolls with 800 Services, Inc the end-user no longer was considered an AT&T customer. AT&T's customer was 800 Services, Inc. The end-user became the customer of 800 Services, Inc. AT&T gave up all proprietary interest and control of the end-user. Thus AT&T was prohibited from collecting any amounts of money from the end-users in excess of the discounts that the CSTPII/RVPP plan provided the end-user.

800 Services, Inc has just discovered the following excerpts taken from AT&T's Further Reply Comments in a case CCB/CPD 96-20 before the Federal Communications Commission (FCC). Case 96-20 was entitled:

JOINT PETITION FOR DECLARATORY RULING ON THE ASSIGNEMENT OF ACCOUNTS (TRAFFIC) WITHOUT THE ASSOCIATED CSTPII PLANS UNDER AT&T'S FCC TARFIFF F.C.C. No. 2.

As stated this case initially involved CCI before settling and was carried onward by the Inga Companies. The plans involved here are the same CSTPII/RVPP plans subscribed to as 800 Services, Inc. The exact same AT&T tariff section applied to this case as applied to 800 Services, Inc. case.

In AT&T's Further Reply Comments of April 15th 2003 AT&T is adamant that the aggregators are responsible for their customers (i.e. the end-users) financial obligations:

AT&T Further Reply Comments page 1:

> "The public Notice requested additional comments on two issues regarding AT&T's tariff FCC No. 2 in affect in January 1995. First the Commission sought comment on "the nature of the relationship, if any, between AT&T and the end-user customers of AT&T's customers under AT&T's tariff No. 2. generally and specifically under the tariff provisions governing the [Revenue Volume Pricing Plan (RVPP) and the Customer Specific Term Plans II (CSTPII)] at issue in this matter. AT&T demonstrated in its Further Comments that under the relevant tariffs, **petitioners were AT&T's customers of record and that AT&T did not have any carrier relationship with Petitioners' customers (the "end-users").** Petitioners do not dispute the accuracy of these statements; just to the contrary, they repeatedly concede that they and not AT&T had the exclusive carrier-customer relationship with the end-users. Similarly the Petitioners acknowledge that **although AT&T also rendered bills to Winback & Conserves end-users on the behalf of the latter entity, the billing arrangement selected by the reseller did not create any carrier–customer relationship between AT&T and the end-users."**

AT&T Page 4:

> "Petitioners also concede that the *liability* for all charges incurred by each location was solely that of the petitioners not the end-users."

The shortfall charges were not the end-users but 800 Services if warranted.

AT&T Page 4:

> "As AT&T's customers-of-record, **Petitioners were responsible for the tariffed shortfall and termination charges.** Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2nd 2003 ("AT&T's Further Comments 2003") at 7-8.

The FCC on Oct 17th 2003 issued a Declaratory Ruling and stated:

> Because these end-users did not choose AT&T as their primary interexchange carrier, AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them. *See Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998).

800 Services, Inc. subscribed to the same Enhanced Billing Option (EBO) at the CCI/Inga Companies, therefore AT&T is admitting that 800 Services, Inc's end-users should not have been charged the shortfall.

FCC's Position on Illegal Remedies Made Clear

AT&T violated its tariff by using an illegal remedy.

The FCC states in its Oct 17th 2003 Declaratory Ruling:

> "We also conclude that **AT&T did not avail itself of the remedy specified in its tariff** for suspected fraud and thus **can not rely upon** the fraud sections of its tariff to justify its refusal to move the traffic. Accordingly, we conclude that AT&T's action in refusing to move the traffic was unlawful and violated subsection 203(c) of the Communications Act. (Oct 17th 2003 p. 14 ¶ 21 Conclusion)

The FCC further stated in its June 2004 filing to the DC Court of Appeals:

> "In essence, the Commission ruled that AT&T had **invoked a remedy other than the ones authorized under its tariff. But the terms of the tariff define and constrain AT&T's conduct and specify the remedies available to the company in connection with its provision of tariffed services**. ***See AT&T v. Central Office Telephone Co., 524 U.S. at 222-24***. As this Court (DC Court) recently noted, "filed tariffs are pointless if the carrier can depart from them at will. Orloff, 352 F.3d at 421. Condoning AT&T's departure in this case from the remedial terms of its tariff would "undermine the regulatory scheme" and give AT&T the power to control the economic fates of its customers here, the resellers. The Commission's holding on this issue thus is both consistent with the law and reasonable."

AT&T again Did Not Avail itself of the Remedy Defined Within its Tariff for Applying Shortfall and Termination Penalties to 800 Services, Inc.'s CSTPII/RVPP Plan

It is clear, AT&T again did not avail itself of the remedy defined within its tariff for applying shortfall and termination penalties. It is not even an issue whether the shortfall penalties were valid, because the FCC position on illegal remedies dictates that AT&T could no longer rely on

the shortfall penalties if AT&T used an illegal remedy in applying shortfall and termination charges.

AT&T Tariff 2 at 3.3.1 Q

The tariff states at Exhibit A bullet 6

> **"-The Customer (i,e. Aggregator) will assume all financial responsibility for all designated accounts in the plan and will be liable for all charges incurred by each location under the plan."**

In Public Comments to the FCC, AT&T emphatically declared that the aggregators' end-users are not AT&T customers. These end-users are the customers of the aggregator. The aggregator is AT&T's Customer not the end-user. The shortfall and termination charges should **not** have been initially placed on the end-users bills. The Customer (aggregator) is responsible for the shortfall charges if valid.

AT&T was constrained by its tariff to initially apply the shortfall and termination penalties against its customer, the aggregator. If the aggregator could not pay AT&T's bill within AT&T's normal 90 day dunning period of the aggregator, AT&T could subsequently only reduce the discounts on the end-users bills that the aggregator had afforded these end-users. The most AT&T could do is remove the discount percentage afforded these end-users by their aggregator 800 Services, Inc,

The tariff clearly states exhibit A at bullet 8:

> "In the event that a location is in default of payment, AT&T will seek payment from the Customer (i.e. aggregator). If the Customer (aggregator) fails to make payment for the location in default of payment, AT&T will: (1) reduce the discount by the amount of the billed charges not paid by that location, if any, and apportion the remaining discount, if any, to all locations not in default, and if payment is not fully collected by the above method, (2) terminate the RVPP/CSTPII for failure of the Customer (aggregator) to pay the defaulted payment."

Again payment comes from the Customer (aggregator) not the end-user. The tariff continues:

> **"-Shortfall and or termination liability are the responsibility of the Customer (aggregator)."**

Again, AT&T admitted to the FCC in its' Public Comments filed with the FCC in 2003 that the end-users of the aggregator are not AT&T customers.

To follow is the most critical part of the tariff as it relates to the infliction of shortfall on the end-users bills of 800 Services, Inc., The tariff continues exhibit A at bullet 10

> **"For billing purposes, such penalties "shall reduce any discounts" apportioned to the individual locations under the plan."**

AT&T was only permitted under its tariff to "reduce any end-users discounts!" AT&T could only place shortfall charges on the end-user bills up the amount of the discount provided by the aggregator, nothing more! To do other than this would constitute an illegal remedy under the tariff.

EXAMPLE:

If there was a phone bill of $100 and the end-user location was receiving a $20 discount, AT&T was confined by its' tariff to only reduce the $20 discount. What AT&T did was charge the $100 user over $600 in penalties. 800 Services Inc.'s customers were livid, contacting their attorneys and every state and federal regulatory agency available.

The tariff law is clear: AT&T should have initially attempted to collect its shortfall and termination penalties from its Customer, the aggregator. AT&T however clearly wished to place the penalties on 800 Services, Inc's end-users and ruin the relationship with its customers and destroy the CSTPII/RVPP discount plan. Clearly AT&T wanted 800 Services, Inc out of business. AT&T wanted all aggregators out of business and AT&T accomplished that. It was not

until 2006 that 800 Services, Inc., discovered that AT&T could not rely on its shortfall due to the illegal remedy it used. Illegal Remedies are not covered with AT&T's tariff.

Here as **exhibit S** is an article entitled:

AT&T Near Deal With FCC To Back Off Campaign Against Resellers.

Obviously AT&T was looking to put every aggregator out of business and did.

Law on Tariff Ambiguity

The tariff citations stated above clearly show AT&T used an illegal remedy. Even if it is viewed as ambiguous AT&T loses.

800 Services was just made aware in 2006 that the FCC stated to the DC Circuit Court in May 2004:

> "On the other hand, where "the usual canons and techniques of interpretation leave real uncertainty" regarding a tariffs application, the Commission properly construes the tariff "strictly against the carrier" and resolves "any doubt in favor of the Customer." *Associated Press* v.FCC. 452 F.2d 1290. 1299 (D.C. Cir.1971) *See Associated Press Request for Declaratory Ruling*, 72 FCC 2d 760, 764-65 (para.11) (1979); Commodity News *Services, Inc. v. Western Union,* 29 FCC 1208, 1213 (para.3) *aff'd,* 29 FCC 1205 (1960).

The Penalties Inflicted on the End-users Were Not a Mistake by AT&T

It was a calculated decision that was evaluated over months. AT&T's senior attorney Charles Fash stated that the alleged shortfall penalty period completes gestation 3 months before the penalties were applied. This is normal as the RVPP discount which carries the penalties lags months behind CSTPII discount. AT&T had 3 months to evaluate if what it was doing was in agreement with its tariff.

AT&T placed the penalties on the end-users bills, and AT&T then blamed the shortfall on 800 Services, Inc. The public screamed over phone bills that were many times higher than normal.

AT&T then threatened 800 Services Inc.'s customers to pay the AT&T phone bill or their toll free phone lines would be disconnected! Since these toll free lines were used for sales and customer service calls, this threatened the very existence of their business. 800 Services Inc.'s business was intentionally destroyed immediately by AT&T, who wanted 800 Services Inc. out of business and obviously engaged in multiple illegal remedies to do so. Not only were the shortfall charges applied by AT&T using an illegal remedy; the charges weren't even valid to begin with.

This issue has to do with this small and easy understandable section of AT&T's tariff which when this incident took place AT&T was required by law to adhere to explicitly. What is most egregious is that CCI's Mr. Shipp knew all this tariff information and submitted it with the Inga Companies to the Court and the FCC and he helped AT&T by not divulging what he knew.

AT&T is well aware that it utilized an illegal remedy as it needed to misrepresent what its tariff stated to the DC Circuit:

800 Services, Inc discovered the following in 2006: AT&T on 12/20/04 filed a Post Oral Brief Pg.5 Para 1 here shown as **exhibit T**

> Declaratory Ruling Para 20n94 (Joint Appendix pg 14),
> "the tariff expressly provides that "any penalty for shortfall and or termination liability will **be ... billed** to the individual locations JA 418"."END (Emphasis Added)

This was an obvious deliberate deception to the DC Court by AT&T. AT&T states the tariff "**expressly provides"** in its quote as it references the Joint Appendix (JA) 418 in that case but AT&T deceptively added **(...)** to its short quote of its tariff because AT&T knew that it was in violation of the tariff and it again attempted to defraud the Court in that case too regarding the illegal billing issue. For these above reasons the shortfall and termination charges inflicted

against 800 Services Inc., were not valid and even if they were could not be relied upon by AT&T do to the illegal remedy used.

800 Services is now discovering that shortfall charges were assessed against the Inga Companies- CCI plans in excess of the discount amount, in June of 1996 and as late as May 1997. If AT&T had divulged the information requested at discovery, 800 Services, Inc., would NOT have had claims barred by statute of limitations. 800 Services, Inc under the continuing wrong Doctrine would have two years from the last AT&T wrong to file. 800 Services did not know AT&T wronged other aggregators as late as May of 1997. 800 Services, Inc would therefore have had until May of 1999 to file a claim. 800 Services, Inc filed its claims in April of 1998 based upon claims in May of 1995 arguing the Continuing Wrong Doctrine. 800 Services, Inc argued that AT&T was still benefiting from the action against 800 Services, Inc. The Court stated that 800 Services, Inc under the Continuing Wrong Doctrine had to point to another actual wrong, not just benefiting from a previous wrong. If AT&T had not defrauded 800 Services Inc, by not divulging the Inga Companies-CCI case info 800 Services, April 1998 filing would have been 13 month early as to the Statute of Limitations.

Fraud Perpetrated On the Court-Discovered In 800 Services, Inc. Case

Paying off the key witness in the 800 Services case and then subpoenaing him was by far the most egregious fraud perpetrated upon the Court by AT&T. When AT&T submitted its brief to Judge Bassler in the Inga Companies case against AT&T in June of 2005, AT&T stated that the same Judge Politan who had found that shortfall charges are illusionary on the pre June 17th 1994 issued plans in the Inga Companies case had decided to award AT&T shortfall in the 800 Services, Inc. Case. 800 Services Inc., has now found out that Judge Politan was misled to believe that 800 Services, Inc's plan was a post June 17th 1994 plan by AT&T and AT&T's cohort CCI's Mr. Shipp.

The Inga Companies president Mr. Inga contacted Mr. Okin in June 2005 because Mr. Inga had recalled that 800 Services Inc. plans had been ordered prior to June 17th 1994 and thus should have been grandfathered if properly restructured. It was in the Phil Okin Deposition that Mr. Okin detailed the 3 steps that Mr. Inga instructed 800 Services, Inc to take. Mr. Inga asked for a copy of the case file. Initially Mr. Inga only looked at Judge Politan's Decision and saw that Judge Politan believed it was a post June 17th 1994 plan. The Inga Companies even stated in its June 2005 filing with Judge Bassler that 800 Services, Inc's plans were post June 17th 1994 ordered. However after the Inga Companies filed such a statement Mr. Inga went back into the 800 Services, Inc case file for further review; at that time Mr. Inga read the Mr. Shipp deposition, saw the letter from Anna Niccolletti and saw the AT&T Network Services Commitment Form contract and realized how AT&T perpetrated fraud upon the 800 Services, Inc and the Court. What happened in the 800 Services , Inc case before Judge Politan is that Judge Politan never had to understand which paper work gets filled out by an aggregator and what boxes are selected etc. This is because the Inga Companies plans traffic only was attempted to be transferred in Jan of 1995 and the plans had not been restructured between June 17th 1994 and Jan of 1995. Therefore the Court never needed to understand how an aggregator through the paper work maintains its grandfathered status. Additionally as we have seen AT&T totally misled Mr. Okin that he could not restructure without charges. When Mr. Okin said I didn't qualify for restructuring he was repeating what AT&T told him. However he had remembered from Mr. Inga how to do the paper work properly for a restructure and he did it properly despite AT&T telling him that his company's "end-users" were going to get hit with millions in charges. Mr. Okin panicked and attempted to delete all the accounts before that happened but aT&t left many accounts on the plan.

In the 800 Services, Inc. case file was a deposition of Larry G. Shipp taken November 23rd of 1999 here as **exhibit U.**

800 Services, Inc discovered in July 2006 that Mr. Shipp two years earlier in 1997 settled with AT&T and agreed to co-operate with AT&T. The Larry Shipp who was the Inga Companies co-plaintiff was not the same Larry Shipp that would be providing a truthful account regarding what happened with 800 Services, Inc's attempt to move its accounts to the 66% discount plan.

The "failure to recalls" the "I do not remembers" and **out right misrepresentations** given by Mr. Shipp were pure fraud being perpetrated on the court. Mr. Okin did not know that Mr. Shipp had settled prior to AT&T subpoenaing him as a witness in the 800 Services Inc. case. 800 Services, Inc now understands why Mr. Shipp answered the questions for the deposition in the manner in which Mr. Shipp did. Mr. Okin had trusted Mr. Shipp as one of the most knowledgeable AT&T tariff experts in the country only second to the Inga Companies president Mr. Inga. Not only did Mr. Shipp settle but he admitted that under his terms of settlement he had to co-operate with AT&T.

What really jumps out is the fact that AT&T's attorney Mr. Brown subpoenaed Mr. Shipp for the deposition. Mr. Shipp had written dozens of letters demonstratively criticizing AT&T. Mr. Shipp made it overwhelmingly clear that CSTPII/RVPP plans, which are issued prior to June 17th 1994 were forever grandfathered when properly restructured. Mr. Shipp clearly expressed his views on what restructuring was and that it can be done as long as the aggregator desires. Was this witness the one that you would want to subpoena if you were AT&T? It would only be if you knew that Mr. Shipp was already in your pocket, having agreed to co-operate!

The Court will also take note that Mr. Shipp had no attorney present representing Mr. Shipps' interests, for his deposition. This was obviously because Mr. Shipp believed that AT&T's counsel Mr. Brown was protecting Mr. Shipps' interests. Comparing Mr. Shipps' letters and

Court and FCC filings before the AT&T-CCI settlement to Mr. Shipps' deposition subpoenaed by AT&T after the CCI-AT&T settlement it quite easy to see the fraud perpetrated upon the Court.

These are just a few examples:

Deposition page 53 Line 25: Answer by Mr. Shipp to 800 Services, Inc's counsel Mr. Murray Question:

Mr. Shipp: Who is it? I don't mean to be flippantly responded to, but it's sort of like Bob Dillon, the times that were changing. The climate for the acceptance of the plans changed drastically between the early and later part of 1994 and through all of 1995 to where it was increasingly difficult for companies that were in the business of aggregating or reselling telecommunications services to make the kind of money they had been used to making. So consolidation or aggregating their plans with one another was a very appealing business solution.

Q: Mr Murray: You mention there was difficulty. Do you know what was causing the difficulty?

AT&T counsel Mr. Brown interjects: I'll object to the form.

Mr Shipp: There had been and there were changes, Mr. Murray, in the tariff filings, the specifics, of which I do not recall, **but there were tariff filings that changed**; there were rates that had been previously high on the retail level that AT&T was offering direct and were now lower."

Mr. Shipp knew full well that any tariff changes are only prospective within the tariff and they had no effect upon 800 Services, Inc's plan. Mr. Shipps' letters carefully explain pre June 17th 1994 plans were forever grandfathered! See Exhibit M Mr. Shipps Jan 14th 1997 letter at 2a. "and therefore restructurable ad-infinitum." Additionally Mr. Shipp knew that it did not make a difference if the rates went down because the aggregators were offering a percentage discount not a cost per minute rate. Whatever the rate was it still would be 28% off the current rate. The

answer was purely done to not damage AT&T. It appears that Mr. Shipp had the questions that were asked ahead of time and his answers were coached by AT&T counsel who he agreed to co-operate with.

Deposition Page: 45: Mr. Shipp answers a question posed to him regarding whether 800 Services could have discontinued its plans without liability, commonly referred to as a restructure. This was a critical question that Mr. Shipp had written many letter on to AT&T that never divulged during discovery:

Mr. Shipp: That there were- that **rules were changing**, and that what could and was being allowed to happen yesterday wasn't happening today. It was just that kind of an undercurrent or a theme, if you will.

Again Mr. Shipp knew that the only rules were the AT&T tariff laws and they could change but they would have no effect on existing plans such as 800 Services, Inc. As Mr. Shipp stated in his letter the aggregator could restructure "ad-infinitum".

Deposition Page: 55: 800 Services, Inc.'s Counsel Mr. Murray asks Mr. Shipp if his own CSTPII plans ever got shortfall penalties placed on them.

Mr. Shipp answers: "Yes **I think,** did I answer your question?" He Thinks! When AT&T placed tens of millions of dollars of shortfall penalties on the end-users of CCI and the Inga Companies plans this led to thousands of complaints to CCI from the FCC, State Attorney General, Consumer Groups, attorneys, etc as CCI and the Inga Companies had many thousands of end-users. Mr. Shipps' and the Inga Companies phones did not stop ringing. Judge Politan eventually issued a Court order against AT&T to stop directing the complaining calls because there were so many complaints! Mr. Shipp was put out of business by AT&T due to these penalties in June of 1996. Mr. Shipp "thinks" there might have been shortfall penalties on the plans!?

Mr Shipp states: "Did I answer your question" This a clear indication of a witness who is looking not to hurt AT&T and wants to answer as abrupt as possible and even asks "Did I answer the question? If AT&T had produced the dozens of Mr. Shipp letters Mr. Shipp could have been given a refresher course.

Deposition page 9: Question AT&T Counsel Mr Brown: Who was the individual that introduced you to Mr. Okin in the Courtroom in NJ in 1995?

Answer: I believe it was Al Inga. The Court can sense the carefulness in Mr. Shipps' response with Mr. Shipps "I believe" preface as if there might have been another person.

Mr. Brown Question: Do you have any understanding as to what Mr. Inga's purpose was in introducing you and Mr. Okin?

Answer: No, I did not understand what his purpose was. I assume that it was just a casual, friendly introduction.

Absolutely amazing! Mr. Shipp wants the Court to believe that during a Court trial that Mr. Inga invited Mr. Okin to a Federal Court House just to say hello to his business partner Mr. Shipp as Mr. Inga always does his casual entertaining at the Federal Court house. Mr. Shipp continues the AT&T cooperation fraud on page 10.

Q Mr. Brown : When you met Mr. Okin in NJ in 1995 what was discussed at the meeting?

Answer: "I don't have any specific recollection. I would only surmise it was small talk." Mr. Shipp would like the Court to believe that they were together to chat about the weather!

MORE AMENISA: Page 11 Line 1: I don't have any specific recollection.

Line 13 answer to the question do you recall Answer: No

Page 13: Line 9 Q Did Mr. Okin as far as you know, ever request that any of his traffic be placed on contract tariff 516?

Mr. Shipp: I do not recall that specific request.

The entire several hour meeting, all that was talked about among Mr. Shipp, Mr. Inga and Mr. Okin were about getting their accounts provisioned to a deeper discount plan, either CT 516 or Tariff 12. The AT&T TSA form that Mr. Shipp received signed by Mr. Okin also went to Mr. Shipp so Mr. Shipp knew full well 800 Services, Inc., wanted its accounts provisioned on PSE's CT 516 discount plan of 66%. Another lie of omission.

Page 13 Line 21: In answer to Mr. Browns' question did 800 Services Inc. request a plan transfer:

Mr. Shipp answers on line 21 Answers: I do not recall that.

Another obvious attempt to conceal the truth. The paper work that was received back from Mr. Shipp confirms that 800 Services, Inc attempted the plan transfer.

Page 14: When asked if Mr. Shipp recalls anything in writing from Phil Okin he again states at line 25: I don't recall.

Page 15 Line 4: In answer to Mr. Brown' question Do you recall the terms of the agreement between CCI and Mr. Okin.

Mr. Shipp again at Line 4 gives the AT&T co-operation answer: No sorry I do not recall.

Page 15: Question: Did you ever advise Mr. Okin that either the plans **or traffic** would not be able to be transferred because of some refusal on the part of AT&T to accept such transfers?

A: I do not recall that.

For Mr. Shipp to say that he does not recall AT&T denying the transfers of the plans or the traffic is as far fetched as it gets. Mr. Shipps' company sued AT&T to get AT&T to transfer traffic only because AT&T was not doing it. Mr. Shipp flew up from Florida to be at the trial in NJ and also went to PA for the Third Circuit hearing in his case regarding not transferring traffic. A good attorney such as Mr. Brown would never run the risk of such poignant questions to the heart of the case unless Mr. Brown knew Mr. Shipp was in AT&T's pocket.

Page 16: Question: Do you know whether any of Mr. Okin's or 800 Services, plans were delayed or refused to be transferred because of something done or said by AT&T?

Answer: I don't remember specifically any instance where I received any information to that effect.

Again another egregious misrepresentation when compared to the litany of Mr. Shipps' letters against AT&T and the correspondence from Mr. Shipp.

Page 21Question: Did he solicit your advice or opinion with respect to the shortfall issue?

A: I don't know that he solicited my advice or my opinion, but I'm certain that I probably discussed with him my thoughts and feelings. Many of which were commonly known at the time, about what was going on.

Q Do you recall what you told him?

A: No sir I don't.

Mr. Shipp says he is certain that he discussed what his beliefs were AT THE TIME, meaning before he was paid off by AT&T, then says I doesn't know what he told Mr. Okin!

Question: Mr. Brown: Now Mr. Okin has alleged in this case that he requested a transfer, his plans or his traffic, to CT 516 but that AT&T refused to honor that transfer. Do you know anything about that?

Answer: No

Mr. Shipp simply gives the co-operative no. It is implausible to believe that Mr. Shipp knew nothing regarding the plan transfer request. Additionally AT&T told all aggregators that it was no longer doing traffic only transfers. That is why Judge Politan asked the FCC whether traffic only transfers could be done. 800 Services, Inc can not be expected to have submitted paper work for a traffic only transfer when AT&T steadfastly maintained for several months prior that

AT&T was not allowing traffic only transfers for any aggregator. For AT&T to say that 800 Services, Inc did not do what AT&T told 800 Services Inc., it couldn't do is ridiculous.

Page 23 Brown: and I am just wondering whether you have any information of any request by 800 Services to **transfer traffic** or plans, regardless of its ultimate destination, that was refused or rejected by AT&T?

Answer: I don't know that.

Mr. Shipp knew very well that the plan transfer was rejected and traffic only transfers were not being allowed; Mr. Shipp later admits that he had problems provisioning traffic at page 29 through page 30:

> Mr. Shipp: It is my recollection that the traffic associated with Mr. Okins customers began to **wane,** was moved, or reprovisioned elsewhere. My companies were in the process of winding down their business operations, and our business relationship began to diminish as a result of lack of traffic, and our ---**our inability to continue to provision traffic**, and it just naturally came to a conclusion."

Mr Shipp admits that he was unable to provision traffic, obviously because AT&T would not accept it, only in reference to the fact that his relationship with 800 Services "began to diminish." Mr. Shipp basically got caught divulging information against AT&T by answering a different styled question. He was answering the question just to answer why he no longer had the relationship with 800 Services, Inc. because the 800 Services, Inc accounts were not getting provisioned. Mr Shipp inadvertently answered the only question that is relevant in this 57 page deposition. AT&T violated its tariff by not provisioning the traffic.

Summary

1) It has just been discovered that AT&T violated Section 203 of the Communications Act by not allowing 800 Services, Inc to restructure its CSTPII/RVPP plan in accordance with its tariff provision "Discontinuation Without Liability" for plans with ID's issued prior to June 17th 1994.

2) It has just been discovered that AT&T violated section 202 of the Communications Act by participating in Discrimination against 800 Services, Inc. regarding restructuring its plans. Aggregators such as the Inga Companies and Combined Companies Inc were allowed to restructure their plans using the same paper work and in the same fashion after June 17th 1994 (March of 1995) and AT&T did not impose shortfall and or termination charges against their plans but did against 800 Services, Inc.

3) It has just been discovered in 2006 that due to the DC Court decision in 2005 that AT&T violated Section 203 of the Communications Act by failing to allow 800 Services, Inc to transfer its traffic only without the plan to another AT&T plan as outlined as the first priority in the Phil Okin deposition.

4) It has just been discovered in 2006 that AT&T waived the shortfall charges for Combined Companies Inc, in July of 1997 and therefore Discriminated against 800 Service under Section 202 of the Communications Act.

5) It has just been discovered in July 2006 by 800 Services Inc., that AT&T intentionally withheld material discovery evidence despite several requests that would have enabled 800 Services, Inc. to enact the Continuing Wrong Doctrine.

6) It has just been discovered in 2006 that the FCC's stance in 2003 was that if an illegal tariff remedy is used AT&T can not rely upon the shortfall even if it was appropriate. Therefore a section 203 violation of the Communications Act is warranted for AT&T having applied

shortfall to the end-user instead of 800 Services, Inc. and then having far exceeded the cap of only reducing discounts.

7) In addition to the above reason to reopen old claims the case 800 Services, Inc's Statute of Limitations has been extended due to Section 415 D of the Communications Act. § 415. Limitations of actions

- (a) Recovery of charges by carrier

  All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun within two years from the time the cause of action accrues, and not after.

- (b) Recovery of damages

  All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

- (c) Recovery of overcharges

  For recovery of overcharges action at law shall be begun or complaint filed with the Commission against carriers within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section, except that if claim for the overcharge has been presented in writing to the carrier within the two-year period of limitation said period shall be extended to include two years from the time notice in writing is given by the carrier to the claimant of disallowance of the claim, or any part or parts thereof, specified in the notice.

- (d) Extension

  If on or before expiration of the period of limitation in subsection (b) or (c) of this section a carrier begins action under subsection (a) of this section for recovery of lawful charges in respect of the same service, or, without beginning action, collects charges in respect of that service, said period of limitation shall be extended to include ninety days from the time such action is begun or such charges are collected by the carrier.

8) AT&T did a manual manipulation override of its Pittsburgh PA billing system to produce shortfall and termination charges when the system would not normally warrant charges on the ID of a pre June 17th 1994 issued plan. AT&T failed to charge Federal excise tax and State sales tax on the shortfall contrary to the tax law due to the charges being manually manufactured. AT&T then utilized the US mails to deliver the bogus bills to end-users in many states to perpetuate the fraud. AT&T unknowingly to the Court pays off a key witness and subpoenas him to perpetrate

the fraud upon the Court. There were over 100 aggregators that were put out of business. The American public did not lose its desire for discounts on their phone bills. AT&T's legal department worked in concert with its business executives to intentionally utilize multiple illegal remedies to put the cottage industry out of business

Sec. 202. [47 U.S.C. 202] Discrimination And Preferences

(a) It shall be unlawful for any common carrier to make and unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each offense and $300 for each and every day of the continuance of such offense.

From: EzyStudentFunds [ezystudentfunds@optonline.net]
Sent: Wednesday, February 15, 2006 1:04 PM
To: Phillip Okin
Cc: Scampato@aol.com; Roger S. Antao
Subject: Re: REVISED PAGE 8

Fred

Let me know when you are available to talk.
Al

----- Original Message -----
From: Phillip Okin
To: 'EzyStudentFunds'
Sent: Wednesday, February 15, 2006 12:58 PM
Subject: RE: REVISED PAGE 8

These are the five areas in which we feel ATT committed fraud upon the court and 800 Services.
1) The whole issue of restructuring, being denied by ATT, being told I was not allowed to, Having Shipp deposed and playing dumb, the fact Shipp was compensated by ATT and this not being disclosed to the court. The fact that if the court was not misled intentionally by ATT, Politan would have ruled in 800 Services favor.
2) Non transfer of 800 Services plan, Shipp flat out lies in the deposition, and ATT using this lie upon the court, If Judge Politan knew that Shipp had indeed been given a proper transfer of my plan, Politan would have sent this case up to the FCC for further review.
3) The FCC recently ruled that ATT acted in an illegal way pertaining to applying shortfall charges, this was an act of fraud, also ATT committed mail fraud by utilizing the U.S. Postal service.
4) The fact that interrogatories questions requesting information not once but infact twice were ignored. I have recently discovered from Al Inga numerous letters from Larry Shipp to ATT, these letters show he played dumb during his deposition, ATT failed to provide documentation that Shipp was compensated.
5) Discrimination, there are two areas here to look at, one is section 202, and the other is section 203.

From: EzyStudentFunds [mailto:ezystudentfunds@optonline.net]
Sent: Wednesday, February 15, 2006 10:14 AM
To: Phillip Okin
Subject: Re: REVISED PAGE 8

I doubt it! I will make him copies of the Politan orders today.

Al

----- Original Message -----
From: Phillip Okin
To: 'EzyStudentFunds'
Sent: Wednesday, February 15, 2006 10:11 AM
Subject: RE: REVISED PAGE 8

So the ball is in his court.I hope he can get it out on Friday.

From: EzyStudentFunds [mailto:ezystudentfunds@optonline.net]

Sent: Wednesday, February 15, 2006 10:04 AM
To: Phillip Okin
Subject: Re: REVISED PAGE 8

I don't know what else he needs.

He has to summarize it regarding the claims he is making. I gave him what he wanted.

Al

----- Original Message -----
From: Phillip Okin
To: 'EzyStudentFunds'
Sent: Wednesday, February 15, 2006 10:00 AM
Subject: RE: REVISED PAGE 8

Al when do you think you will be done?

From: EzyStudentFunds [mailto:ezystudentfunds@optonline.net]
Sent: Wednesday, February 15, 2006 9:55 AM
To: Phillip Okin
Subject: Re: REVISED PAGE 8

That is all in the brief
Al

----- Original Message -----
From: Phillip Okin
To: 'EzyStudentFunds'
Sent: Wednesday, February 15, 2006 9:45 AM
Subject: RE: REVISED PAGE 8

Al when you make the draft remember to include that the FCC recently ruled that when ATT applied shortfall to the aggregators account they acted in an illegal manor, and therefore by committing an illegal act, that should constitute fraud, and that is what Fred stated we needed to show in order to get the case open.

From: EzyStudentFunds [mailto:ezystudentfunds@optonline.net]
Sent: Tuesday, February 14, 2006 1:46 PM
To: Scampato@aol.com; phillo@giantpackage.com; Roger S. Antao
Subject: REVISED PAGE 8

Fred

ALSO Understand this....This is also fraud upon the Court.....

An important part of 800 Services case is that Phil was told that he could not transfer just the accounts on the plan without transferring the entire plan with the accounts.

You will see in the Okin deposition that he mentions that AL Inga told him what to do.
1) Move accounts without the plan. (AT&T was not allowing this.)
2) Move the plan with the accounts (He tried this but was rejected by GE News)
3) Delete the accounts from his plan.

What also has to be worked in is that 800 Services Inc., was told that accounts could not be transferred

without the plan also being transferred. Therefore 800 Services had to attempt step two because AT&T was not allowing step 1.

The Inga Case vs AT&T before Judge Politan in March of 1996 resulted in a question sent by the Third Circuit Court under Primary Jurisdiction Referral to the FCC.

The question referred to the FCC was:

"'whether section 2.1.8 [of AT&T's Tariff FCC No. 2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction."

Fred you see what this means is that AT&T was not allowing aggregators to transfer traffic without the plan which is what Okin says was his first objective in his deposition.
It was not until 2003 that it was decided by the FCC that traffic could be assigned without the plan. However the FCC believed that section 3.3.1.Q was the proper section not Section 2.1.8. The FCC still ruled in the Inga Companies favor despite believing that we used the wrong section. The FCC just said what was done was not prohibited.
The FCC (INGA VS AT&T) case was then judicially reviewed by the DC Court and in their opinion in Jan 2005 they stated:

I) "In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of "traffic."

II)"As the foregoing discussion indicates, we find the Commission's interpretation implausible on its face. First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and not just transfers of entire plans."

III) DC Court Decision "We conclude that **traffic is a type of service covered by the transfer provision**, and that the Commission's contrary interpretation would render the provision meaningless.

IV) DC Court Decision: "Absent such reliance, the commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass **transfers of traffic alone**."

So what happened was that the DC Court said that 2.1.8 was the correct transfer section as we had done. So we went from a decision (FCC) which said what we did was not prohibited thus allowed, to a decision (DC COURT) which said what we did was expressly permissible.

AT&T deceived everyone for 10 years as to the permissibility of traffic transfers without the plan. Okin could not have fond out about this until now.

Fred we need to talk with Roger again and I have an angle. It is a discovery issue and it is also fraud upon the Court.

Also when AT&T hit Phil's customers that constitutes **mail fraud** because what AT&T did was deliver bogus charges that it knew were bogus utilizing the US mail.

Al

From: Mr. Inga [ajdmm@optonline.net]
Sent: Tuesday, January 31, 2006 2:26 PM
To: Scampato@aol.com; antao@legalaction.com; phillo@giantpackage.com
Subject: Re: Fred: Would a certification from Shipp to this effect help?

I have the Politan Decisions. We do not have any of the other stuff.

The lies that Shipp stated are not direct lies. They are lies of omission at best. The main thing you need is two things 1) The plan was properly restructured and AT&T did not give 800 Services credit for this. AT&T lied and said he would have penalties assessed against him. 2) The accounts were transferred to Shipp and he did confirm AT&T denied the transaction. THAT IS IT PERIOD.

Shipps statements in the deposition were misconstrued by AT&T. There is not a direct lie regarding these two items.
To say Shipp was compensated $100 million is far fetched. He was given cash less than a million. AT&T told him that he did not have to pay shortfall and termination which were bogus charges anyway that required no rendering of services by AT&T.

The Court would believe AT&T misrepresented and misconstrued Shipp more than Shipp willing to commit perjury to assist AT&T. The point is AT&T is the one who defrauded Phil.

When Shipp now finds out about how AT&T lied he sets the record straight and says AT&T defrauded 800 Services. His letters back up his statements.

----- Original Message -----
From: Scampato@aol.com
To: ajdmm@optonline.net ; antao@legalaction.com ; phillo@giantpackage.com
Sent: Tuesday, January 31, 2006 2:06 PM
Subject: Re: Fred: Would a certification from Shipp to this effect help?

In a message dated 1/31/2006 1:24:43 P.M. Eastern Standard Time, ajdmm@optonline.net writes:

> Fred

> I can get a certification from Larry Shipp stating that:

> 1) He has just been made aware that AT&T totally misrepresented what he
> stated in his deposition.

> A) The statement at deposition that was asked regarding restructuring was
> answered "times were changing". This meant that AT&T was not adhering to
> its tariff and allowing pre June 17th 1994 CSTPII/RVPP plans to be
> restructure. That is what was changing, not the tariff. Pre June 17th 1994

> CSTPII/RVPP could be continually upgraded /restructured without ever
> paying shortfall and termination charges.

> B) I also have just discovered that AT&T counsel in its brief to the 3rd circuit
> Court totally misstated that CCI did not have knowledge of 800 Services
> Accounts being submitted to CT 516. AT&T statements were a lie. I did
> confirm that the 800 Services Inc, accounts were transferred from the plan
> and attempted to be placed on CT516. AT&T rejected this account traffic
> transfer.

> What we are attempting to prove is that AT&T defrauded 800 Services. I
> still think that this works if Shipp says that AT&T totally misconstrued
> statements that Shipp made.

> Fred lets have a pow wow again with Roger and discuss strategy. It may be
> easier to say that AT&T misconstrued Shipps statements than try to say that
> say Shipp knowingly perjured himself just to help AT&T.

> The judge would have an easier time believing AT&T lied and misconstrued
> Shipp than they worked in cahoots.

> Al

Dear Al:

I don't have a problem with obtaining a certification from Shipp in the future. But at this point, I want us to stay focused on working towards getting a rough draft of our brief done. From one of your prior emails it is my understanding that you don't have any additional proof that the FCC forced AT&T to settle with the aggregators. However, I would like to acquire the other items listed in my 1/20/06 email ASAP:

1. Memo drafted by Al and Phil of the facts to the two issues mentioned in our telephone conversation two weeks ago. If I recall correctly, Phil stated that Larry had lied in responding to two deposition questions. It would be very helpful to Roger and I if you would provide us, in detail, as to precisely what the lies were, how the
lies or omissions were important (i.e. what was the impact on Judge Politan's decision) and how truthful answers from Larry on those two questions would have altered Judge Politan's decision to grant summary judgment.

2. Obtaining a copy of the oral argument of the summary judgment motion. As Roger has explained, it is the acts of the attorneys for AT&T which will be of greatest help in opening the courthouse doors for us. AT&T attorneys may have committed fraud upon the court in answering some of Judge Politan's questions at oral argument.

3. A complete copy of Mr. Okin's deposition, including exhibits.

4. The Stipulation of Dismissal and Order dated February 5, 1999, the Order dated August 12,

1999 (this dismissed Counts 1, 2, 3, and 10 of the complaint, as noted in Footnote 1 of Judge Politan's letter decision).

5. Copies of the key decisions in Mr. Inga's case, i.e., in particular, the District Court decisions of May, 1995 and March, 1996.

Fred